No. 22538

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MECHANICAL SPECIALTIES COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Order of the National Labor Relations Board.

BRIEF OF PETITIONER.

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Jurisdictional Statement.

This case is before this Court by way of a petition praying that a Decision and Order of the National Labor Relations Board (reported at 166 NLRB No. 31) be reviewed and set aside. The Board has filed a cross-petition for enforcement of its Order. Petitioner is engaged in business in this judicial circuit, in the State of California, and the unfair labor practices alleged in the complaint upon which the Decision and Order of the Board was entered allegedly occurred in California. Petitioner is aggrieved by such final Order of the Respondent and, therefore, this Court has jurisdiction under §10(f) of the National Labor Relations Act, as amended [61 Stat. 136 *et seq.* (1947), 27 U.S.C. §141 *et seq.* (1958)] (The pertinent statutory provisions are reprinted, *infra,* at Appendix D.) The Respondent, in its answer and cross petition, has admitted Petitioner's jurisdictional allegations.

I.
STATEMENT OF THE CASE.

Mechanical Specialties Company, the Petitioner, located in the Metropolitan Los Angeles area, is engaged in business in the manufacture of tools, gauges, special machines, missile components and nuclear components for its customers. It has been in business for the past 30 years and employs about one hundred and fifty employees. On March 16, 1965, Petitioner received a demand letter from the United Auto Workers Union stating that it represented a majority of Petitioner's employees and requesting that collective bargaining negotiations be commenced. By letter of March 19, 1965, Petitioner responded stating, among other things, that it doubted in good faith the Union's claim to majority status and rejected the demand.

On March 22, 1965, the union filed a representation petition with Region 31 of the NLRB seeking a union

election in the plant [G.C. Ex. 1(a); R. T. 5].* After a representation hearing was held to determine questions of unit scope and employee eligibility, Respondent directed an election [G.C. Ex. 1(b)(c); R. T. 5]. The results of that election, held June 11, 1965, show a decisive rejection of the union—59 to 40 [G.C. Ex. 1(d)].

Thereafter the union filed objections to the election and first amended unfair labor practice charges which alleged violations of Section 8(a)(1)(2)(3) and (5) of the Act [G.C. Ex. 1(f), (h)].

The Respondent's Regional Director then issued a complaint and consolidated for hearing the objections and unfair labor practice charges [G.C. Ex. 1 (j), (1)]. The hearing took place from April 25 to May 26, 1966 before an NLRB Trial Examiner. On February 23, 1967, the Trial Examiner's Decision issued, finding that Petitioner had violated §8(a)(1) by engaging in coercive pre-election conduct, §8(a)(2) for having formed a grievance committee, §8(a)(3) for having terminated employees Klein and Cantrell, and §8(a)(5) for having refused to bargain with the union in March 1965 upon its demand [C. T. 23-42]. Petitioner filed exceptions to that Decision with Respondent [C. T. 46-65]. On June 28, 1967, Respondent's Decision and Order issued upholding its Trial Examiner in all material respects [C. T. 66-69]. The employer's Petition for Review by this Court followed on January 11, 1968, asking that the Respondent's Order be set aside in its entirety [C. T. 70-81].

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*References to the stenographic transcript of the consolidated hearing are preceded by the designation "R. T." and citation is made to the appropriate transcript page number. References to the documents reproduced in "Transcript of Record, Vol. I" are preceded by the designation "C. T." and citation is made to the appropriate page number. References to all undesignated exhibits are made by citation to the appropriate exhibit number.

II.

SPECIFICATION OF ERRORS RELIED UPON.

The Respondent erred in the following respects:

1. In concluding and holding that the Union, on March 12, 1965 and at all times material herein, had been freely designated as bargaining representative by a majority of Petitioner's employees in an appropriate unit.

2. In concluding and holding that Petitioner did not have a good faith doubt that the Union represented a majority of its employees at the time of the Union's demand for recognition.

3. In concluding and holding that Petitioner had unlawfully refused to bargain with the Union within the meaning of §8(a)(5) of the Act.

4. In concluding and holding that Petitioner violated §8(a)(1) by questioning employees in a context of threatened plant closure and by granting a wage increase.

5. In concluding and holding that Petitioner violated §8(a)(2) by creating and using a grievance committee.

6. In concluding and holding that employees Cantrell and Klein were discharged by Petitioner in order to discourage activity on behalf of the Union in violation of §8(a)(3) of the Act.

III.
SUMMARY OF ARGUMENT.

In this brief, Petitioner will show:

A. The Union at no time was the freely selected collective bargaining representative of a majority of Petitioner's employees. On the contrary, the preponderance of evidence shows that Petitioner's employees were duped and misled into signing union authorization cards in the belief, induced by union representatives, that the cards would merely lead to an election. Respondent erroneously and prejudicially ignored or discounted all of this evidence.

B. That even, *arguendo,* if it could be held that a majority of Petitioner's employees had freely and intentionally designated the Union as its collective bargaining agent, nonetheless, at the time the Union made its demand upon Petitioner, the Petitioner had a good faith doubt as to the Union's majority and therefore properly and by law rejected the Union's demand; that said good faith doubt was proven conclusively in the record but that Respondent erroneously and prejudicially ignored or discarded all of this evidence; and that even if it be found that Petitioner committed unfair labor practices, said activity did not and does not detract in any way from the proven good faith doubt as to the Union's majority held by Petitioner.

C. That the 8(a)(1), 8(a)(2) and 8(a)(3) findings by Respondent are unsupported in the record, erroneous and prejudicial to Petitioner and based not upon facts but upon its Trial Examiner's own unique philosophy of how Petitioner should run its plant and how the Act should be interpreted; and, at any rate, assuming the commission of any unfair labor practice, such activity does not justify or permit the remedy urged by Respondent.

IV.
ARGUMENT.

PART 1.

THE UNION'S ALLEGED MAJORITY AND THE PETITIONER'S GOOD FAITH DOUBT: THE ASSERTED 8(a)(5) VIOLATION.

Preliminary Statement.

The principal issues involved in this case center around the application of the doctrine advanced in the *Bernel Foam* case, 146 NLRB 1277 (1964), which would require Petitioner to recognize and bargain with the Union, notwithstanding the Union was decisively rejected by the great majority of Petitioner's employees in an NLRB election. The Respondent Board affirmed its Trial Examiner's strictest possible application of that doctrine against the overwhelming weight of evidence and, Petitioner submits, contrary to the emphatically expressed desire, *at all times,* of those most affected—the employees. The Trial Examiner's and Respondent's instant decisions have been routinely advanced by them notwithstanding the near universal position of the courts that *Bernel Foam* (as even its proponents would admit) is a harsh "remedy" and should not be applied *pro forma* but should be resorted to only in the most telling situations.[1]

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[1]Petitioner herein does not attack the *Bernel Foam* doctrine but rather its application in the premises. The doctrine, but more particularly its application by the Board in numerous cases has been strongly attacked by scholarly reviews. See an excellent Note entitled "Union Authorization Cards" in 75 *Yale Law Journal* 804 (1966). See also Lesnick "Establishment of Bargaining Rights without an NLRB Election", 65 *Mich. L. Rev.* 851 (1967); "Refusal-To-Recognize Charges under Section 8-(a)(5) of the NLRA: Card Checks and Employee Free Choice" 33 *U. Chic. L. Rev.* 387 (1967). While some courts and writers have supported the theory of *Bernel Foam,* the Board's application of that doctrine in numerous instances has scarcely been defended and has been under attack by both authorities in the field and the Circuit Courts, as will be indicated *infra.*

Indeed, since this case arose and was heard, most federal Circuit Courts have been confronted with situations wherein the Board urged that its *Bernel Foam* 8(a)(5) holding be upheld. And in all cases involving similar facts as those existing in the instant litigation, at least eight Circuits have clearly but emphatically rejected the Draconian positions urged by Respondent.

In regard to the question as to whether, in the first instance, the Union properly obtained a majority of authorization cards, so as to permit even *consideration* of a *Bernel Foam* remedy, at least seven Circuit Courts have in numerous cases denounced the very same position that the Board advances in this case.[2]

As to the second issue, whether Petitioner held a good faith doubt as to the Union's majority, assuming, *arguendo,* the existence of a majority, at least five

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[2]Second Circuit: *NLRB v. S. E. Nichols Company,* 380 F. 2d 438 (1967); *NLRB v. River Togs, Inc.,* 382 F. 2d 198 (1967); *NLRB v. Golub Corporation,* 388 F. 2d 921 (1967).

Fourth Circuit: *Filler Products, Inc. v. NLRB,* 376 F. 2d 369 (1967); *Crawford Manufacturing Co., Inc. v. NLRB,* 386 F. 2d 367 (1967), *cert. den.,* ..... U.S. .....; *NLRB v. S. S. Logan Packing Company,* 386 F. 2d 562 (1967).

Fifth Circuit: *Engineers & Fabricators, Inc. v. NLRB,* 376 F. 2d 482 (1967); *NLRB v. Lake Butler,* ..... F. 2d ..... (1968).

Sixth Circuit: *Dayco Corporation v. NLRB,* 382 F. 2d 577 (1967); *NLRB v. Swan Super Cleaners, Inc.,* 384 F. 2d 609 (1967); *NLRB v. Shelby Manufacturing Company,* 390 F. 2d 595 (1968).

Seventh Circuit: *NLRB v. Dan Howard Manufacturing Co.,* 390 F. 2d 304 (1968).

Eighth Circuit: *Bauer Welding and Metal Fabricators, Inc. v. NLRB,* 358 F. 2d 766 (1966).

Tenth Circuit: *NLRB v. Midwestern Manufacturing Co., Inc.,* 388 F. 2d 251 (1968).

And see also *NLRB v. Freeport Marble & Tile Co., Inc.,* 367 F. 2d 371 (1st Cir., 1966).

Circuits, including this Court, in a number of cases have spurned the unrealistic position of Respondent.[3]

The foregoing overwhelming case authority should be decisive of the instant action; indeed, the absence of a true majority in support of the Union and the patent existence of a good faith doubt on the part of Petitioner are even more emphatic in light of the record in the instant case than was the situation in any of the foregoing cases wherein Respondent's positions were rejected.

The most salient point in this case, and one which the Trial Examiner and Board recognized only in theory, is that it is *employees' rights we are expounding.* Whatever the alleged "sins" of Petitioner may be, unless they clearly had the effect of dissipating an established majority for the Union, to apply the Bernel Foam "remedy" would make the 1947 legislation a mockery of individual rights. Better to fine or punish the sinner (if he be such) than to "remedy" the situation by "punishing" the employees. And if Respondent does not have the authority to fine or punish Pe-

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[3]Second Circuit: *NLRB v. Flomatic Corporation,* 347 F. 2d 74 (1965); *NLRB v. River Togs, Inc.,* 382 F. 2d 198 (1967); *Textile Workers Union v. NLRB,* 380 F. 2d 292 (1967).

Sixth Circuit: *Peoples Service Drug Stores, Inc. v. NLRB,* 375 F. 2d 551 (1967); *NLRB v. Shelby Manufacturing Company,* 390 F. 2d 595 (1968); *Lane Drug Co. v. NLRB,* ..... F. 2d ..... (1968).

Seventh Circuit: *Wausau Steel Corp. v. NLRB,* 377 F. 2d 369 (1967).

Eighth Circuit: *NLRB v. Johnnie's Poultry Co.,* 344 F. 2d 617 (1965); *NLRB v. Morris Novelty Co.,* 378 F. 2d 1000 (1967); *NLRB v. Arkansas Grain Corp.,* ..... F. 2d ..... (1968).

Ninth Circuit: *Don The Beachcomber v. NLRB,* 390 F. 2d 344 (1968).

titioner—assuming that such is even proper—then it should go to Congress to seek such authority; it should not macerate the rights of employees to teach employers.

The final critical test here is did the Union at the crucial period of time in question truly represent the majority of the employees of Petitioner. And, assuming, *arguendo,* that this could possibly be answered in the affirmative, can it be said that the General Counsel has borne the burden of proof of showing that the Employer did not entertain a good faith doubt as to the Union's representative authority? If, as we contend and as we trust the record supports, either the Union did not represent a majority of the employees or the Petitioner did have a good faith doubt as to the existence of a union majority in an appropriate unit, then an 8(a)(5) finding cannot be supported either in law, logic or on the record.

A. The Union's Alleged Majority: Fraud Run Rampant.

Clearly, for Respondent to travel successfully the long road leading to a Bernel Foam "remedy," it must first begin by proving that the Union, at the time it made its demand upon Petitioner, had been selected by a majority of Petitioner's eligible employees within an appropriate unit for the purpose of representing those employees in collective bargaining. The Board's General Counsel has failed to meet the burden of proof incumbent upon him in the premises. The evidence shows that there has never been, at any time pertinent to these proceedings, a majority of the employees of

Petitioner who have freely, and without misrepresentation, designated the Union as its collective bargaining agent.

The General Counsel introduced its Exhibit No. 101, which the parties stipulated to as being "the list of employees to be considered as the appropriate unit at the time of the demand which was March 12 continuing through March 16 (1965)," excluding certain employees and leaving the status of three and later only one employee in doubt [R. T. 717-720]. An examination of that exhibit shows there to be 114 employees within the unit at the time of the demand. Of this number, only the status of one individual at the end of the hearing was in issue.[4] Thus, it was necessary for the General Counsel to show that 57 or 58 employees validly and freely designated the Union as their collective bargaining agent.

In an effort to meet his burden of proof, the General Counsel introduced Union authorization cards of various employees. The authenticity of approximately half of these cards was evidenced not by the individuals who purportedly signed these cards but by handwriting expert testimony. *In toto,* 68 authorization cards, which the Union allegedly possessed as of the time Petitioner received its demand, were introduced in evidence and the authenticity (as distinguished from the validity) of most, but not all, of these cards was supported either by testimony of the General Counsel's

[4]The record is unclear as to whether Zadnik during this time possessed the requisite indices of a supervisor.

expert or evidence of other witnesses, including some of the purported signators of these cards.[5]

The authenticity of *at least* three of the cards clearly lacked in the record the verification necessary to allow their acceptance as evidence supporting the Union's alleged majority and, in these cases, the cards may not be used for that purpose. The General Counsel failed to bear his burden of proof in regard to

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[5]The following are the applicable cards admitted into evidence:

G.C.		G.C.	
1.	#25 Cantrell	35.	#67 Howard
2.	#28 I. Klien	36.	#68 Hughes
3.	#29 Rawl	37.	#69 Johnson
4.	#30 Ahlstrom	38.	#70 Kastendick
5.	#31 Knowles	39.	#71 T. Klein
6.	#33 Burke	40.	#72 Kofink
7.	#34 Proudfoot	41.	#73 Kuhmann
8.	#40 Ampthor	42.	#74 Lamb
9.	#41 Anothaiwongs	43.	#75 Lawrence
10.	#42 Bertram	44.	#76 Meier
11.	#43 Booze	45.	#77 Morrow
12.	#44 Cheetham	46.	#78 G. Neumann
13.	#45 Christenson	47.	#79 K. Neumann
14.	#46 Christopher	48.	#80 O'Kane
15.	#47 Cisneros	49.	#81 Osdale
16.	#48 Congrove	50.	#82 Patterson
17.	#49 Conner	51.	#83 Polony
18.	#50 A. Crandall	52.	#84 Rhedin
19.	#51 D. Crandall	53.	#85 Schlapp
20.	#52 Cuda	54.	#86 Scoggins
21.	#53 Dellomes	55.	#87 Seymour
22.	#54 Dodd	56.	#88 Smith
23.	#55 Doebler	57.	#89 Tieman
24.	#56 Dufek	58.	#90 Thiekotter
25.	#57 Estrada	59.	#91 Virgil
26.	#58 Garger	60.	#92 Voegeli
27.	#59 Garrett	61.	#93 Vogel
28.	#60 Gedminas	62.	#94 Welch
29.	#61 Gumm	63.	#95 Rbt. Weymar
30.	#62 Haeler	64.	#96 Rolf Weymar
31.	#63 Harrison	65.	#97 J. B. Williams
32.	#64 Hinsch	66.	#98 Wilson
33.	#65 Hoef	67.	#99 Wright
34.	#66 Homnan	68.	#100 Zirbel

these three cards and the Trial Examiner and Board completely ignored any and all evidence pertaining to the authenticity of any of these three particular cards; indeed they did not even allude to them though they were clearly and continually raised.[6]

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[6](1) G.C. Ex. #41, purportedly signed and dated by Niyom Anothaiwongs, a citizen of Thailand who was, at the time of the hearing, in Thailand [R. T. 1739-1740]. The General Counsel's handwriting expert testified that he had no opinion as to whether Anothaiwongs did, in fact, both sign and date G.C. #41 [R. T. 248, lines 4-5]. The General Counsel attempted to have this necessary information supplied by Anothaiwongs' fellow countryman and employee, Manit Homnan (Narathip). Homnan, himself, could scarcely read English and was extremely limited in his ability to speak the language. He, himself, did not make out his own card but Anothaiwongs purportedly did. Homnan testified on direct examination that he did not know whether Anothaiwongs signed his own card [R. T. 491, lines 17-19; 492, lines 3-4] and at one point stated that Anothaiwongs did not show it to him [R. T. 493, line 25, to 494, line 4]. Under these circumstances, there is no question that the card may not be included for the purpose of determining a majority. See *Indiana Rayon Corp.*, 151 NLRB 130, 1294 (1965); *Conso Fastener Corp.*, 120 NLRB 532 (1958). See also *NLRB v. River Togs, Inc.*, 382 F. 2d 198 (1967); *NLRB v. Midwestern Manufacturing Co., Inc.*, 388 F. 2d 251 (10 Cir., 1968).

(2) G.C. Ex. #55 was purportedly signed and dated by Dennis Doebler, who at the time of the hearing, was in the Army [R. T. 1739-1740]. The expert called by the General Counsel was not able to give an opinion as to whether G.C. #55 was both signed and dated by Doebler [R. T. 205, line 6; 250, line 4]. Subsequently, the General Counsel tried to establish the validity of this card through the testimony of Irving Klein. Klein testified that he gave Doebler a card but he did not know the exact date, adding, "practically the first two weeks of March." [R. T. 305, lines 1-8]. Klein did not testify as to when Doebler gave him the card back and he added that he paid no attention to the date on the card nor did he see him sign it [R. T. 307, line 6, to 308, line 8]. Also, there is no evidence whatsoever when Klein turned this card into the Union.

Since the record does not show when Doebler's card was signed, nor when Doebler dated it, nor if he dated it, nor whether it was handed to Doebler by Klein before or after the Union made its demand, nor when he returned it to Klein, nor when Klein turned it into the Union, it is abundantly clear that this card, too, may not be considered valid designation of the Union by Doebler

(This footnote is continued on the next page)

Moreover, the Trial Examiner unduly and prejudicially precluded Petitioner from properly examining the handwriting expert in order to impeach his authentication of authorization cards. The General Counsel called an expert, John J. Harris, who testified to the authenticity of signatures on numerous cards by comparing them with other documents which employees had signed, including W-4 forms, all admittedly genuine.

On cross-examination, counsel for Petitioner tried to have Harris compare certain authorization cards with other documents purportedly signed by employees about whose cards he had *not* testified [R. T. 255-256]. Some of these employees were later going to testify directly as to whether their card signatures were authentic. Counsel for Petitioner began by showing Harris an employee's W-4 withholding form for one Andy Ahlstrom, together with a group insurance application form and two checks purportedly signed by him. At this point, the general Counsel objected to counsel's questioning as being outside the scope of direct examination. The Trial Examiner erroneously sustained the objection [See R. T. 256-258].

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at the time in question. See *Indiana Rayon Corp., Conso Fastener Corp., NLRB v. River Togs, Inc.* and *NLRB v. Midwestern Manufacturing Co., Inc., supra.*

(3) G.C. Ex. #76 was purportedly signed and dated by Anton Meier, who at the time of the hearing was in Oregon [R. T. 1739-1740]. The General Counsel's expert was unable to testify whether the person who signed G.C. #76 was the same person who filled in the date nor could he identify the person who did so [R. T. 225, line 18, to 226, line 13]. The expert called by Petitioner, however, stated emphatically that the date on G.C. #76 was not filled in by Meier nor by the person who signed that card [R. T. 1272, lines 6-25; 1273, line 22, to 1274, line 1; 1278, line 22, to 1279, line 5]. Obviously, the card may not be utilized for the purpose it was offered. See *Indiana Rayon Corp., Conso Fastener Corp., NLRB v. River Togs, Inc.*, and *NLRB v. Midwestern Manufacturing Co., Inc., supra.*

The Trial Examiner misconceived the proper scope of cross-examination of an expert witness when he limited that examination solely to signatures which had been verified on direct. It is a well-established rule of evidence that the cross-examination of an expert witness is not limited to the scope of his testimony on direct but that, in addition, an expert may be fully cross-examined as to the matter upon which his opinion is based and the reasons for his opinion. This, of course, includes showing an expert specimens on cross-examination of what has not been testified to on direct, in order to impeach his prior testimony. Obviously, if counsel had been allowed to continue this line of examination, and the expert had after comparison testified to the genuineness or invalidity of a signature on any document of one who later testified on the stand to the contrary, a wholly different light would have been thrown on *all* of the cards which the expert had previously verified.

In his treatise on evidence, Wigmore soundly condemns any prohibition on the use of this technique. Thus, he states:

> "That the latter [use of documents whose genuineness is not already admitted to impeach an expert] is the better course seems clear. The reason is that the deprivation of this weapon for the cross-examiner is a loss so serious as to outweigh the inconveniences of its sanction. When, for example, the witness has sworn positively that the disputed signature is genuine, and then, on examining a new signature submitted to him, he declares with equal positiveness that it is a forgery and perhaps points out the (to him) unmistakable marks of difference, the testimony of a single unimpeachable witness that he saw the supposed

> forgery written by the person bearing that name disposes at once of the trustworthiness of the first witness and the certainty of his conclusion. In many other similar ways a single test of this sort will serve to demolish the most solid fabric of handwriting testimony. There should be no limitations whatever on the power of employing these tests." (Wigmore on Evidence, 3 Ed. Vol. VII, p. 213)[7]

It is therefore, improper to sustain an objection to this line of questioning merely because it extends beyond the scope of direct examination.

Resolution of the question of majority status solely on the basis of cards is a questionable procedure at best. The situation becomes even more aggravated when the General Counsel attempts to prove the authenticity of cards, not by the direct, in-person testimony of those who purportedly signed them, but rather through the testimony of a handwriting expert. Certainly in this situation, counsel for Petitioner should be afforded the widest latitude in his attempts to impeach that expert by inducing him to affirm the genuineness of a false specimen or to deny the genuineness of an authentic specimen. This was precisely what the Trial Examiner's ruling precluded Petitioner from doing.

At any rate—and aside from the foregoing argument—there can be no question that the authenticity of

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[7]Under the Act, Trial Examiners are bound to follow rules of evidence applicable in U. S. District Courts which, in turn, follow state rules of evidence. *Starlight Mfg. Co., et al.,* BNA, 64 Daily Labor Report, April 1, 1968. The new California Evidence Code, Section 721, is in accord with Wigmore.

The reason for the more liberal rule of cross-examination is made clear in *Hope v. Arrowhead & Puritas Waters, Inc.,* 74 Cal. App. 2d 222, 344 P. 2d 428 (1959). See also *People v. Tallman,* 27 Cal. App. 2d 209, 163 P. 2d 857 (1966).

G.C. Exs. 41, 55 and 76 has not been adequately supported by the General Counsel and, accordingly, *at the very least*, they may not be included for the purpose of determining the Union's alleged majority. Thus, at the most, there is in evidence the cards of only 65 employees that have been shown to be authentic and that may possibly be utilized for the purpose of attempting to establish that the Union had been designated by a majority of the employees at the time in question.

The next question—and one of critical and major significance—is the determination of how many of these 65 cards truly represented the voluntary designation of the Union as the collective bargaining agent of the signators and, conversely, how many of these cards must be rejected and declared invalid for this purpose because of false representations, important misleading statements and other expressions of deceit that caused various signators to sign the cards.

The Trial Examiner and Respondent *completely* ignored the voluminous evidence concerning these matters, including the uncontradicted testimony of not only Petitioner's witnesses but witnesses for the General Counsel clearly underscoring and supporting Petitioner's position. The Trial Examiner simply disallowed (more as a matter of personal conviction than on credibility) all the employee's testimony because, as he put it, the employees were "intelligent." Admittedly the employees are intelligent individuals and fine craftsmen. But most of them were totally unsophisticated concerning the field of labor-management relations. A large amount, if not the majority, are recent immigrants to this country, many of them can scarcely read English, a great proportion of them usually talk in one of many foreign languages, and virtually none of them had reason to disbelieve the Union when it made its

misrepresentations. To state, as the Trial Examiner did, that "One who preferred not to have a Union would probably prefer also not to have an election and would not sign a card" [C. T. 29, lines 11-40], is not only totally unsophisticated on the part of a layman, to say nothing of a Trial Examiner and Respondent, but defies the record in this case. Such a position exalts the authorization card, as such, to a position which is contrary to law, logic, reason and reality. If the consequences of such a position were not so tragic, it could be termed comical.

The record shows and this brief will discuss at length the innumerable falsities expounded by the Union, its agents, organizers and adherents as to the purpose and effect of the cards at the time they were being circulated and the *fact* that numerous signator-employees were duped as a result of the Union's culpable misrepresentations and executed cards as a direct consequence of these misrepresentations. As a result of what can only be labeled a deliberate attempt by the Union to deceive the employees as to the purpose and use of these cards, there was created during this critical period of time an almost universal belief shared by most employees that these cards were to be used to bring about an election. Whether the adverb "solely" or "only" or "merely" or "strictly" is applied, in the final analysis, numerous employees believed, based upon Union misrepresentations, that the card had one purpose: an election. There was created throughout the plant, therefore, by design on the part of the Union, a general atmosphere that these cards would bring about an election and that the employees could then register their views.

At the outset, we note that the utilization of cards to gain recognition without an election is fraught with

serious drawbacks and has received limited acceptance. Indeed, the Board itself has long recognized their unreliability. In *Sunbeam Corp.*, 99 NLRB 546, 550-51 (1952), the Board labeled cards a "notoriously unreliable method of determining majority status of a union. . . ."[8]

The gravaman of the instant dispute is that the Board has in recent times adopted a policy of accepting, at face value, the language of cards signed by employees as to their intention to designate the union as their bargaining representative unless, and only unless, union solicitors for these cards misrepresented their purpose by asserting that the cards were to be used "only" or "solely" for purposes of an election. This peculiar policy has been denounced by almost every Circuit Court in numerous cases in recent years and, indeed, it is in contravention of the Board's earlier policy as

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[8]And see 75 *Yale Law Journal* 804, 818-819 (1966) where it is stated:

> "Authorization cards are an unreliable index of employee choice. Compared with the secret ballot they replace, their solicitation is a woefully defective process, guaranteeing to employees neither a free nor a reasoned choice. Their admitted inferiority to a properly conducted secret ballot should preclude their use absolutely when the employer has not committed an unfair labor practice interfering with employee free choice. And even when the employer does illegally interfere with free choice, authorization cards are so unreliable that a re-run election—or two or three or ten—better protects employee freedom. A causal relationship between employer misconduct and election results has never been proven, despite statistical and scientific case studies. It is as likely as not that a union loss, even when the employer has committed unfair labor practices in the campaign, accurately reflects employee wishes. Statistics on authorization cards, on the other hand, have corroborated their unreliability. It is ironic that the Board denies an election or re-run in order to protect employee free choice and then orders bargaining on the basis of cards which offer even less protection."

established in *Englewood Lumber Company,* 130 NLRB 394 (1961), where Respondent stated:

> "In these circumstances, considering only what the employees were told, and not what may or may not have been their subjective reaction to what they were told, we do not think it can reasonably be said that the employees, by their act of signing authorizations, thereby clearly manifested an intention to designate the Union as their bargaining representative."

Respondent, however, in the instant case clearly adhered to its present but indefensible policy of accepting at face value cards when the magic words "only" or "solely" were not explicitly utilized by union solicitors in representing that the purpose of the cards was to have an election.

This "blind" approach to the validity of cards has been rejected by almost every Circuit Court confronted with the question. Each of them has pointedly and emphatically spurned the Trial Examiner's critical conclusion in this case that "One who preferred not to have a Union would probably prefer also not to have an election and would not sign a card." [C. T. 29, lines 11-40].

Recently, the Fifth Circuit in *Engineers & Fabricators, Inc. v. NLRB,* 376 F. 2d 482 (1967) met this same issue. According to that court, testimony before the Trial Examiner indicated that frequently employees' signatures were obtained by telling them that the card was not for union membership but rather to obtain an NLRB election. As the court sees it, the Board relies on the rule that:

> ". . . if such cards as these are solicited by a statement that they are to be used to get an election, but are later used to prove majority status,

there is no misrepresentation. According to the Board, if would require a statement that the cards were used *only* to get an election to constitute misrepresentation."

Judge Coleman's opinion for the court comments that the Fifth Circuit "has previously shown its impatience with such contentions." The court further stated:

"The Board has the same burdens and obligations as any other litigant who takes the affirmative, and must prove its charge. *NLRB v. Riverside Mfg. Co.,* 5 Cir. 1941, 119 F. 2d 302. Therefore, the general counsel had the burden of showing that the cards authorized representation. . . .

"When cards are challenged because of alleged misrepresentations in their procurement, the general counsel must show that the subjective intent to authorize union representation was not vitiated by such representations. Here the Board did not apply this legal standard. Instead it contends that

> '. . . documents timely executed which unequivocally authorize a labor organization to act as the collective-bargaining agent of the signers must be treated as valid bargaining authorizations in the absence of a showing of coercion in their procurement of representations that despite the purpose clear and expressly stated on the cards themselves the cards would be used only for a different more limited purpose. *Aero Corp.,* 149 NLRB No. 114, 57 LRRM at 1490.'

"This applies too lax a standard, and therefore the burden was not met. The point is that the Board applied the facts to the wrong legal standard because there was no probing into the subjective intent of the challenged signers."

While there may be some difference of opinion as to whether subjective intent, *per se*, is a proper factor to take into consideration—a matter which we shall later discuss at length—there is no question (1) that the court in *Engineers & Fabricators* rejected the Board's policy outright and (2) recognized the essential requirement that all misrepresentations which lead to employees being duped into signing authorization cards are not only proper but necessary matters of inquiry. In the instant case, as will be pointed out below, it is not necessary (although probably proper) to delve into employees' subjective intent; it is surely necessary and proper, however, to analyze the nature of the misrepresentations which both Respondent and the Trial Examiner summarily ignored.

The Second Circuit was equally emphatic in rejecting the Respondent's cavalier treatment of union misrepresentations in these circumstances. In *NLRB v. S. E. Nichols Company,* 380 F. 2d 438 (2d Cir., 1967), the court was confronted with a similar, indeed scarcely distinguishable situation. There, the court stated, initially:

> "The Board makes much of the supposed clarity of the cards used by the Union in this case, in contrast to the deceptive or ambiguous ones in other instances where it nevertheless upheld the union . . . But while clarity should constitute the beginning of any effort to show a majority on the basis of authorization cards, it is not the end; the clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the 'witty diversities' of labor law. It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations

> matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality. The very argument by which the Board has upheld unions even when the cards were deceptively worded, namely, of placing 'more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards' *NLRB v. Winn-Dixie Stores, Inc., supra,* 341 F.2d at 754, works against it here. In our view the evidence demands a conclusion that at least three of the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election."

One of the employees in the *S. E. Nichols* case had been told by the union representative that "There would have to be an election and if she wanted to change her mind, she could." Another one stated that the union organizer said he was soliciting cards "for the purpose of representing the union, to petition the NLRB in Washington as representative of the employees at Nichols to investigate the conditions in the store, and that if I signed the card I would not be joining the union . . ." and "In order to get the union in the store an election would have to be held in the store." A third employee was given similar assurances and interpretations of the purpose of the card. As in the instant case, the cards were essentially unambiguous and manifested an intention, on their face, to designate the union as the signer's collective-bargaining agent.

The Second Circuit reviewed most of the case law existing at the time and distinguished those cases wherein the union clearly advised employees that the cards could be used either for an election or for recognition without an election. The court went on to state:

> "It is quite a different matter to permit a union to attain recognition by authorization cards procured on the affirmative assurance that there would be an election without a further clear explanation that the cards can and may also be used to obtain recognition without any subsequent expression of preference by the employees; such a half-truth gives the employees the false impression that they will have an opportunity in all events to register their true preferences in the secrecy of the voting booth. As has been well said, Note, *supra,* 75 Yale L.J. at 826:
>
> > 'If the employee thinks the cards will lead to a secret ballot, he can insure himself against the possibility of future retaliation and prevent harassment only by signing. Such an employee may sign a card planning to vote against the union or at least intending to reserve decision until he hears the employer's views or talks to fellow employees.'
>
> "We decline to encourage such an impairment of employees' §7 rights."

Thereafter, the same court, in *NLRB v. The Golub Corporation,* 388 F. 2d 921 (2d Cir., 1967), reaffirmed its *Nichols* position. Indeed, in that case the misrepresentations made to the employees are exactly the same as those in the instant case and both the Board and the Trial Examiner in each of the cases treated them exactly the same—*i.e.,* upheld the validity of the

cards notwithstanding the misrepresentations. The Second Circuit, however, stated:

> "The Trial Examiner's conclusion as to majority status rested on the legal premise which we have declined to adopt, *NLRB v. S. E. Nichols Co.,* 380 F.2d 438, 444-45 (1967), that even though a union has led signers of authorization cards to believe that it would obtain representative status only by winning an election, a card clear on its face is valid unless the employee was told that its *sole* purpose was to obtain an election—words such as 'sole,' 'merely,' 'just,' or 'only' being invested with a kind of talismanic quality . . ." The Board has not asked us to enforce the order on the grounds that Pepe's or Petrignani's cards were valid nor has it sought a remand for resolution of the credibility issue. Rather, conceding that the card of Marcella McCarthy also was invalid under the *Nichols* rule, it seeks enforcement on the basis that there are still enough valid cards to constitute a majority. We disagree; the cards of Eleanor Carbone and Vincent Zielnicki were also obtained by misleading the signers into the belief that the union would not become their representative unless it won an election. Freddie Russom, the solicitor who approached Pepe, Petrignani and McCarthy, had also solicited the card of Louis Peluso, telling him, in Peluso's words, that by signing a card 'I didn't have to obligate myself to the union just that I would sign the card and I didn't have to join if I didn't want to,' and had obtained the cards of five other employees only one of whom testified. Question has been raised whether proof of a pattern of misrepresentation by a particular solicitor may not require the General Counsel to come forward with testimony by all signers. Lesnick,

Establishment of Bargaining Rights Without an NLRB Election, 65 Mich. L. Rev. 851, 857-58 (1967). The Trial Examiner ruled against this on the basis that, under the 'sole purpose' rule, only two of Russom's solicitations could be faulted and no pattern of misrepresentation had been shown; if the correct figure was four out of five, a different result might follow. We therefore decline to enforce so much of the Board's order as holds that the company's refusal to recognize the union violated §8(a)(5) and turn to the alleged violations of §8(a)(1)."

Soon after the Second Circuit rejected Respondent's position, the Fourth Circuit in even more pointed language did likewise. In *NLRB v. S. S. Logan Packing Company,* 386 F. 2d 562 (4th Cir., 1967), still another case involving the application of *Bernel Foam* reached the circuit court. And once again, still another circuit court found it necessary not only to reject Respondent's peculiar position but to admonish it against continuing its practice. The court said:

"It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. This, the Board has fully recognized [citing cases]. So has the AFL-CIO [AFL-CIO Guidebook for Union Organizers (1961), quoted in Senate Hearings on § 14(b), 190.]. In 1962, Board Chairman McCulloch presented to the American Bar Association data indicating some relationship between large card-signing majorities and election results [1962 Proceedings: Section of Labor Relations Law, American Bar Association 14-

17]. Unions which presented authorization cards from thirty to fifty per cent of the employees won nineteen per cent of the elections; those having authorization cards from fifty to seventy per cent of the employees won only forty-eight per cent of the elections, while those having authorization cards from over seventy per cent of the employees won seventy-four per cent of the elections. This suggests that the greater the majority of authorization cards, the greater the likelihood of a union election victory, but, obviously there are exceptions. Though ninety per cent of the employees may have signed cards, a majority may vote against the union in a secret election. Overwhelming majorities of cards may indicate the probable outcome of an election, but it is no more than an indication, and close card majorities prove nothing.

"The unsupervised solicitation of authorization cards by unions is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying 'No.' [See, *e.g.,* recognition in the Organizer's Guidebook, *supra,* of the fact that some cards are signed to 'get the union off my back.'] This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance.

"That is not the most of it, however. Though the card be an unequivocal authorization of representation, its unsupervised solicitation may be accompanied by all sorts of representations. 'We

need these cards to get an election. You believe in the democratic process, don't you? Do you want to deny people the right to vote? Isn't it our American way to resolve questions at the polls? Do you want to deprive us of that right? Are you a Hitler or something? . . .

"The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time, however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.

"For such reasons, a card check is not a reliable indication of the employee's wishes."

The issue became still more pointed in a companion Fourth Circuit case, *Crawford Manufacturing Co., Inc. v. NLRB,* 386 F. 2d 367 (4th Cir., 1967). The facts there are practically a carbon copy of those existing in the instant case. The evidence there showed that the union repeatedly emphasized to employees that the authorization cards it was soliciting would be used to bring about an election.

"At the very least, the findings of the examiner and the testimony of the employees make an issue of whether the cards were signed as a power to the union to act for the employees. Put the other way, the issue is made whether the cards were signed solely to procure an election.

"On the question whether the cards evidenced an intentional and intelligent authorization by a majority of the employees to the union to represent them, we think the burden of proof was on the General Counsel of the Board. *Engineers & Fabricators, Inc. v. NLRB,* 376 F.2d 482, 487 (5 Cir. 1967); *Peoples Service Drug Stores, Inc. v. NLRB,* 375 F.2d 551, 556, 557 (6 Cir. 1967). Regardless, however, of where the burden lay, we are obligated to scrutinize the entire record and ascertain whether there is substantial evidence for the Board's finding here that the union, when it demanded recognition, was representing a majority of the employees. *National Can Corporation v. NLRB,* 374 F.2d 796, 804 (7 Cir., 1967).

"The examiner here stated, with ample justification, that there was considerable confusion: some employees thought that by signing the cards they were only calling for an election, and others were confused by the union's representations as to the significance of the cards. Actually, if we spell out of the cards the meaning attributed to them by the examiner—a dual purpose, first the call of an election and then admission to membership—the doubt still lurks, for even then the applicant's membership is, in his own mind, conditioned on a union victory in the election. Proof of such a prevalent and pervading misconception when generated by the union organizers' represen-

tations cannot be ignored. It is not decisive that the cards in their terms contained no suggestion that they signified anything less than a direct grant of authority for the union to act as collective agent for the employees. Despite the regard we hold for the contrary opinion, e.g., *NLRB v. Cumberland Shoe Corp.*, 351 F.2d 917, 920 (6 Cir. 1965) and cases there cited, we will not stick mechanically to the literal phrasing of the cards. A ghost of the parol evidence rule, such literalism subordinates what really counts: the actual understanding of the signers . . .

"In fine, when as here substantial evidence does not show that the employees signed authorization cards free of any misapprehension of their purpose, a union majority entitling the union to representation cannot be said to have existed. Indeed, for the employer to have recognized it in these circumstances would have been a usurpation of the choice of a representative when by Section 9(a) of the Act, the selection belongs to the employees. In the face of such a doubt as presently appears, recognition by the employer is forbidden by law. *Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961)."[9]

While the court in *Crawford* may have possibly entertained the acceptance of evidence going to the subjective intent of the employees who signed cards, this factor was not the crux of the court's decision. A care-

[9]That the Fourth Circuit does not take the position that authorization cards may never be used in lieu of an election to gain recognition is clear by a later case from that circuit, *NLRB v. Lifetime Door Company*, ... F. 2d ..... (4th Cir., 1968). There the court examined the record carefully and concluded that because "there is no hint of impropriety in the solicitation or execution of the cards . . ." the Board's order was justified.

ful reading of the *Crawford* case indicates that the Fourth Circuit has aligned itself with most other circuits which have refused to stick mechanically to the literal phrasing of the cards when presented with wholesale misunderstanding as to their purpose created by the union. The evidence that the Fourth Circuit said was proper to consider in weighing the validity of the cards is what was said to the employees at the time the cards were solicited. The subjective understanding of the employees solicited is an aid in determining the nature of the misrepresentations. The Court need not ignore this factor. At any rate, in the instant case, as will be shown below, not only did the Trial Examiner and Respondent reject any evidence as to what the employees actually believed to be the purpose of the cards, but they completely and unquestionably ignored the plethora of evidence that these employees were unmistakably misled as to the purpose of the cards. Thus, though some evidence of subjective intent under these circumstances is proper, it is neither necessary nor crucial in the premises because the evidence was overwhelming that the Union made wholesale misrepresentations in an effort to obtain cards.

The Associate General Counsel for the NLRB in a talk in February 1968 stated:

> "The Board has chosen the *Crawford* case as the most appropriate vehicle available up to now for seeking Supreme Court review of the authorization-card issue. Petition for certiorari has just very recently been filed." (Gordon, "Union Authorization Cards and the Duty to Bargain" Daily Labor Report, 33 BNA, Feb. 15, 1968.)

In April, 1968, the Supreme Court denied certiorari.

In March 1968, the Fifth Circuit was again met with still another case indistinguishable from the in-

stant one, *NLRB v. Lake Butler Apparel Company*, ... F. 2d .... (5th Cir., 1968). Once again, a circuit court rejected the Board's position and specifically disagreed with and indeed criticized the Board rule, formerly approved by the Sixth Circuit, that cards were valid unless the Union solicitor had stated to the employee that the *only* and *sole* purpose of executing the card was to obtain an election. *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), *enfd., NLRB v. Cumberland Shoe Corp.*, 351 F. 2d 917 (6th Cir., 1965).

The Fifth Circuit recognized that the cards used at the Lake Butler Apparel Company had no reference to an election on them. Nonetheless, the Union solicitor had indicated to the employees that they were to be used to "petition for an election and that if we won the election we would be their bargaining representative."

The General Counsel had the burden of proving that the cards were not executed for the limited purpose of an election, the Court said, but he failed to carry that burden in connection with at least seven employees. They testified that they signed the cards only to get an election, and six were told that they could vote for or against the Union at the election. The Court said:

> "These representations were not denied by the solicitors and their clear import is that they were false in light of the turn of events whereby the union is claiming recognition without an election. Our view is that they were conditions which attached to the fact of the card executions. The language printed on the reverse side of the cards [providing for union membership and check-off], which the employees did not read and no copy of which was left with them, must give way to the

agreement negotiated in each case between the solicitor and the employee.

"Because the record will not support a finding that the General Counsel overcame the testimony of these employees that they executed the cards on a misrepresentation of fact, it follows that these employees must be eliminated from the total of 37. Thus the union did not have a majority on May 19, 1964, the crucial date."

In rejecting the *Cumberland Shoe* rule, the Court said that while that rule may simplify the problem of evidence, "there are countervailing policy considerations." The rights involved are those of the employees, the Court said, and concluded, "A rule of convenience such as that formulated in *Cumberland Shoe* must give way to truth based on the record considered as a whole." Such is the case here.

Recently, even the Sixth Circuit has recognized that the *Cumberland* rule, which it had formerly approved, simply cannot be adhered to in cases of this sort and it retreated from its previous position. The first case in which the Sixth Circuit began to restrict the *Cumberland* rule was in *Dayco Corp. v. NLRB,* 382 F. 2d 577 (6th Cir., 1967). The Court there recognized that the Union agent had misled employees into signing cards by emphasizing that the cards were necessary in order to secure a Board election. Citing *Bauer Welding and Metal Fabricators, supra,* the Court said, "where the union has engaged in such misrepresentation, cards so obtained are not necessarily a valid designation of a collective bargaining representative." The Court found this especially true when the cards themselves included the holding of an election as one of its purposes. Therefore, viewing the evidence as a whole, the Court concluded the Board had not produced substantial evi-

dence to support the assertion that the union had possessed a valid majority.

A few months thereafter, the Sixth Circuit was again met with this now typical situation in *NLRB v. Swan Super Cleaners,* 384 F. 2d 609 (6th Cir. 1967). The Trial Examiner and Board in that case had rejected the company's claim that certain cards were void because Union solicitors had represented to the signers that the cards were to be used to obtain a Board election. In trying to ascertain whether the Union had a majority, the Court, assertedly "obedient" to its decision in *Cumberland Shoe,* nonetheless carefully inspected the evidence surrounding those cards which were the product of the signers' belief that they were to be used only to obtain an election. After examining that evidence, the Court stated:

> "We at once make clear that we do not consider testimony of a subjective intention not to join the union as of controlling importance. See *Joy Silk Mills v. NLRB,* 185 F(2) 732, 743 (CA D.C. 1950) *cert. den.* 341 U.S. 914. But it is relevant in assessing the effect of the solicitor's words, for it casts a telling reflection on the actual communication conveyed to the signer. The testimony of the signer as to his *expressed* state of mind is also relevant in determining whether his misapprehension over the purpose of the card was *knowingly induced* by the solicitor. Such inducement of an employee who openly expresses an intention not to join the union suggests that representations concerning an election were intended to lead to a belief that the only purpose of the card was to hold an election. . . .
>
> *"We think it right now to say that we do not consider that we have announced a rule* [referring to *Cumberland, supra*] *that only where the solicitor*

of a card actually employs the specified words 'this card is for the sole and only purpose of having an election' will a card be invalidated. We did not intend such a narrow and mechanical rule. We believe whatever the style of actual words of the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the only purpose of the card is to obtain an election, an invalidation of such card does not offend our Cumberland rule. . . . (Emphasis supplied.)

"It appears that the examiner's position was, and the Board's position now is, that unless the solicitor has actually employed the words 'sole' or 'only' in his sales talk, our opinion in *Cumberland* insulates the solicitation from condemnation, no matter what its other vices. We do not believe the language employed in *Cumberland* suggests any such mechanical interpretation. The 'outright misrepresentation' referred to therein could certainly be accomplished by other words than 'sole' or 'only.' A sophisticated and only modestly talented union agent could easily live with such a narrow rule and, leaving out the *bad words*—'sole' and 'only'—employ language clearly calculated to lead a laundry worker to believe that the holding of an election was all that she signed up for."

The type of evidence that the Court examined is unquestionably indistinguishable from that involved in the instant case, as will be seen below. The exact same type of statements were made by Union solicitors in each of the cases. Indeed, here the Union's own literature, as will be shown, further stressed that the purpose of the card was simply to have an election.

In denying enforcement of the Board's order in *Swan Super Cleaners,* the Sixth Circuit cited with approval

Judge Friendly's statements made in *NLRB v. S. E. Nichols, supra.* All of these cases, as can be seen, have now almost become stereotype. The Union does everything in its power to convince the employees that the cards will be used for an election, notwithstanding the wording of the cards and has, up until recently, gotten away with this ploy by not using the words "solely" or "only." Now almost every circuit court that has met the issue has refused to condone this type of union practice; and the Supreme Court has effectively refused to support the Board.

In March of this year, the Sixth Circuit again rejected the Board's unfettered utilization of authorization cards. In *NLRB v. Shelby Manufacturing Company,* 390 F. 2d 595 (6th Cir., 1968) the court, in citing many of the cases already referred to herein, stated that the misrepresentation was made more clear in light of the fact that the "card solicitors did in fact represent to a number of employees that their purpose was to secure an election. The Examiner in his decision stated:

> 'Several witnesses testified that the talk all over the plant during the campaign was about having an election.' "

The exact situation here existed in the instant case—only magnified.

The Seventh Circuit has recently joined the tide in rejecting the Board's position in these situations. In *NLRB v. Dan Howard Manufacturing Co.,* 390 F. 2d 304 (7th Cir., 1968), among other issues involved was the question of the validity of a card signed by an employee on the basis of a misrepresentation that the card merely admitted her to a Union meeting and permitted her to vote for the Union. The representations made to this and other employees, as set forth by the circuit court in an appendix to its opinion, are a carbon copy

of the misrepresentations that existed in the instant case. The court there reviewed case authority in the field in light of the evidence and concluded that the testimony clearly inferred that the employee's card in question was obtained because the employee was led to believe that it would grant the Union an opportunity to have an election. The court rejected the Board's rule in Cumberland and concluded:

> "In the recent case of *NLRB v. Swan Super Cleaners*, No. 16952 (October 25, 1967), the Sixth Circuit, through Judge O'Sullivan, explained its decision in *Cumberland,* expressly disavowing the view that *Cumberland* held that the very word 'sole' or 'only' was needed to invalidate a card. The court adhered to *Cumberland,* saying that its rule is not offended by invalidating cards, no matter what style or wording was used by the organizer 'if it is clearly calculated to create in the mind of the one solicited a belief that the only purpose of the card is to obtain an election.' The court pointed out that it is relevant to consider the subjective intention of the signer and his expressed state of mind in deciding whether a misapprehension was knowingly induced.
>
> "We apply the restatement in *Swan* of the *Cumberland* rule and hold that 'in its total context' the only reasonable inference that can be drawn from the Weiner-Burdette colloquy, as testified to by her, is that statements made by Weiner created in Burdette's mind a misapprehension as to what signing the card meant and that her signature on the card did not represent an intention to designate the Union as her bargaining agent."[10]

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[10]Even more recently the Eighth Circuit has reaffirmed its position in *Bauer Welding and Metal Fabricators, supra,* and reasserted on March 12, 1968, in *NLRB v. Arkansas Grain Corp.,*

(This footnote is continued on the next page)

In light of the great weight of authority discussed above, an examination of the facts in the instant case will demonstrate beyond argument that that authority and logic is controlling in the instant situation.

The facts in the instant case show:

The Union, in its written communications to the employees, from the very start made it clear beyond contention:

(1) That the Union was attempting to have an NLRB election conducted in Petitioner's plant (as well as other plants) and that cards were being solicited for *that* purpose;

(2) That if sufficient cards were obtained, there would be an election;

(3) That the Union never stated it would attempt to use the cards for any other purpose but to have an election;

(4) That the Union never attempted nor did it advise the employees in any understandable manner that the cards could or would be used for any other purpose; and

(5) That most, if not all, of the employees in Petitioner's plant believed, based upon the Union's representations, that the only purpose of the cards was to have an election and acted in reliance on those representations.

..... F. 2d ..... (8th Cir., 1968) that cards may be a totally unreliable indication of majority status. (See footnote 4 therein.) It would appear that the Tenth Circuit, as well, has held that cards are subject to a far more severe test than the Board would apply in proving their validity. The Tenth Circuit in *NLRB v. Midwestern Manufacturing Co., Inc.*, 388 F. 2d 251 (10th Cir., 1968), in rejecting the Board's position to require an order to bargain, examined critically this question.

B. The Facts Relating to the Union's Gross Misrepresentations.

The first communication which was circulated to the employees by the Union that is in evidence is a letter signed by Vincent Sloane, the UAW representative, dated March 3, 1965 [R. Empl. Ex. 4]. This letter, which was circulated and sent to "All Tool and Die Workers in Southern California," discussed the organizing drive of the UAW, the advantages of unionization, the meetings that were being held and concluded as follows:

> *"It is estimated that by March 14, a number of shops will be in a position to petition for elections. It is our intention to petition for each shop at the point where a substantial majority of the shop employees have signed and mailed in their Authorization Cards.* I therefore urge you to make every effort to see that your shop is signed up at the earliest possible date. . . ." (Emphasis supplied.)

It is patently clear that from the start the Union made it clear to all employees involved that it was going to attempt to use the cards for one purpose—to petition for an election. No other purpose was even faintly suggested.

The second communication, which appears to follow up the letter of March 3, is R. Empl. Ex. 5, dated March 10, 1965, also signed by Sloane. This letter, which was also sent or circulated to "All Tool and Die Workers in the Southern California Area," began as follows:

> "I am pleased to announce that the UAW Organizational Drive now in progress to organize all of the tool and die industry in Southern California is proceeding at an encouraging and rapid

> pace. Signed UAW Authorization Cards from almost all of the plants involved are being received every day. *At this point in the campaign, a number of the plants involved are almost ready to petition for their secret ballot representation elections.* (Emphasis supplied.)

Once again, the Union told all employees that the purpose of these cards was to petition for a secret ballot representation election; and once again, not the slightest hint that cards were being collected for any other purpose.

But if there were any doubt at all as to the Union's program of deception in misrepresenting to employees that the cards were only to be used for purposes of an election, such doubt was resolved by the Union's distribution of what is entitled "UAW Fact Finder" [R. Empl. Ex. 6]. Not only did the Trial Examiner give little or no attention to R. Empl. Exs. 4 and 5, but he, enigmatically, summarily dismissed the very existence of R. Empl. Ex. 6. Clearly, his actions in this regard cannot be sustained. This clever piece of propaganda was distributed to the employees at Union meetings during the period that the Union was soliciting cards. It is drafted in the form of a questionnaire wherein the employee is to check off which of three alternative answers to each question is the correct one. The questions are extremely revealing as to what the Union was trying to connote to the employees and the suggested answers, one of which was presumably true, are even more revealing. Virtually all of these questions deal solely with the question of an election, as can be seen by a copy of R. Empl. Ex. 6, attached herein as Appendix "A".

The first question and set of possible answers deals with the percentage of cards of employees required to

have a secret ballot representation election. The second question considers the most effective way to obtain cards from employees. The third statement and the possible alternative answers reads as follow:

"When a tool and die worker signs a U.A.W. Authorization Card, it means that—

A. He will definitely vote 'YES' for the U.A.W. on Election Day. ☐

B. If the employee knows very little about the U.A.W., its contracts and achievements, he may still be swayed by last minute Company letters and captive audience meetings to vote for the Company. ☐

C. He is just trying to get the Volunteer Organizer off his back." ☐

Thus, in plain, unambiguous language, the Union told the employees that the card means one of the above three things. *Nothing* whatsoever either in that statement or in any other statement in R. Empl. Ex. 6 (or in any other communication in evidence) remotely hinted that the cards were to be used for any other purpose. No reasonable man can read R. Empl. Ex. 6 (as well as the other Exhibits) and conclude other than that the Union made a deliberate attempt to make employees believe that cards were for one purpose and one purpose only: to have an election. All the other questions on that document discuss the secret ballot representation election. All this long before the Union ever filed a petition for an election and all this during the time that the Union was actively soliciting cards. Surely, such deception not only taints and clouds the cards that were signed under these circumstances but makes them totally unacceptable for any purpose. The

Trial Examiner and Board could not explain R. Empl. Ex. 6 in light of their reasoning and findings, so they simply ignored it, as they essentially did with the other germane exhibits.

In an attempt to escape the powerful impact of the misrepresentations contained in the Union's literature, Union representative, Sloane, testified that at one of the many meetings the Union had, held on February 28, 1965, he advised the employees there of the procedure under the NLRA and read to them a demand letter previously sent to the Cadillac Gage Company in Costa Mesa [G.C. Ex. 36] which, he asserted, would have advised the assembled employees that the Union would, in the instant case, use the cards for the purpose of demanding recognition without an election. He further testified that he told the employees, based upon his experience, that companies never recognize unions based upon such demand letters and that there would undoubtedly have to be an election [R. T. 693, line 11, to 697, line 23].

Throughout the long hearings, dozens of employees were called upon to testify by both parties. Of these many employees, some 23 gave testimony indicating that they were present at one or more of the Union meetings held in February and March of 1965. In not a single instance did any of these employees testify that Sloane read the material he claimed to have read. In fact, 14 of these employees were called by the Board and not one of them supported Sloane's testimony; indeed, at least four of them pointedly contradicted him. Even among the Union's most stalwart supporters there is no support for Sloane's testimony, though these employees were present at the meetings where he spoke (See testimony of Cantrell, I. Klein, Rawl, Ahlstrom, Burke, Williams, Hughes, Wright, Kastendick and A.

Crandall). Of the four General Counsel's witnesses who described what Sloane had said at these meetings, Virgil testified that at the meeting he attended, Sloane stressed the importance of the cards and said the more cards that the Union had signed, the greater the chance of winning the election [R. T. 374, lines 2-11] and testified to nothing about Sloane advising the employees that they could be represented by the Union without an election. Kofink, called by the General Counsel, testified on cross-examination that he attended the meeting of February 28 (the same meeting that Sloane discussed in his testimony) and in regard to what Sloane said, Kofink testified:

> "A. It seems to me that it was stressed that as many—to get as many cards as possible signed in order to have an election. . . .
>
> Was anything said by Mr. Sloane about the Union representing the employees without an election?
>
> A. No.
>
> Q. Did Mr. Sloane say other employees—that the people there should get other employees to sign the cards.
>
> A. Yes.
>
> Q. Did he say why?
>
> A. For that reason.
>
> Q. To have an election?
>
> A. Yes.
>
> Q. Didn't he say the more cards that they had, the better chance they had of having an election?
>
> A. That is correct.
>
> Q. After he spoke and made these statements is when you signed your card; is that correct?
>
> A That's right." [R. T. 505, line 24, to 506, line 23].

On redirect examination, he testified:

"Q. Do you recall what he said about a majority in the cards?

A. That a certain percentage was needed, 51 per cent out of 100, I guess.

Q. For what purpose?

A. In order to have an election.

Q. I see.

Do you recall Mr. Sloane reading a letter at that meeting? [Referring to Cadillac Gage demand letter.]

Mr. Tobin: Objection.

Trial Examiner: Overruled.

The Witness: No, I don't." [R. T. 507, line 19, to 508, line 22].

Robert Weymar testified on cross-examination that at that same meeting he recalled Sloane saying:

"A. He said something—at the end of this meeting, he said, 'If anyone has not signed an authorization card yet, there will be more available for those that haven't signed, and we are trying to get as many as possible signed to get enough power to bring an election about.'

Q. Did he say anything about having the Union represent the employees without an election?

A. Not that I recall." [R. T. 518, line 23, to 519, line 5].

On redirect examination, Weymar testified:

"Q. You remember Vincent Sloane talking?

Now, the best you can recall, what did Mr. Sloane say about the organizational campaign at Mechanical Specialties?

A. I am quite sure he did not mention Mechanical Specialties at that time. He was talking about a union campaign in Southern California

which included certain number of tool and die shops.

Q. I see.

Now to the best of your recollection, what were his words with regard to the authorization cards?

A. I remember him speaking about a certain percentage, which I am not sure of what it was, but in connection with the fact that if enough employees would sign the cards there would be an election held.

Q. Did he mention anything about the Union getting in without an election? Do you call?

A. I don't recall that, no." [R. T. 529, line 19, to 530, line 13; 531, lines 14-23].

Cisneros testified on cross-examination that at a union meeting which he attended, Sloane stated that they were going to call an election and Cisneros recalled that Sloane said at that meeting that all he needed was 50 per cent to call an election [R. T. 585-586].

Nine other employees who were present at meetings at which Sloane spoke were called by Petitioner. All of those either contradicted Sloane's testimony or could not support it.

Dellomes testified that he attended three meetings where Sloane spoke and he recalled him stating that the Union had to have a certain number of cards "that were enough to gain an election, and we needed more cards to show a greater strength of employees for the Union." [R. T. 1356]. Polony testified that he was under the impression that the cards were for the purpose of having an election and that a number of employees told him that the statement on the card that served as authority for the U.A.W. to represent the signer "didn't mean a thing." [R. T. 1372]. He

could recall that at neither of the two meetings he attended where Sloane spoke was anything said that the Union could represent employees without an election [R. T. 1375, lines 2-9]. The evidence showed that Estrada attended the meeting of March 14 but his testimony also fails to support Sloane's assertions.

Riegler testified he was present at the Union meeting of March 14 and that he recalled Sloane speaking.

> "A. Yes. As far as I recall, he said they have given us cards to sign now, but it is also good to get as many as possible, because they are going to be a few guys that will change their minds until the election.
>
> Q. Do you recall him saying anything about having the Union represent the employees at Mechanical Specialties without an election?
>
> Mr. Somers: Objection.
>
> Mr. Arnold: Objection.
>
> Trial Examiner: I will overrule the objection. You may answer.
>
> The Witness: Not that I recall, sir." [R. T. 1390, line 25, to 1391, line 11].

Booze testified that he attended three meetings where Sloane spoke and that he "explained the cards to us. He said at such time we would have enough we would have an election." [R. T. 1426, lines 12-13]. He further testified that Sloane did not say anything to the effect that the Union could represent the employees of Petitioner without an election. [R. T. 1427, lines 14-23; 1432, lines 2-19].[11] Lawrence testified that he

[11]On cross-examination, Booze gave the only semblance of support to Sloane's testimony of all the witnesses who testified on the subject. He stated that Sloane said that if enough cards were signed, they would be presented to the Company but that the Company would turn them down and that there would be an election [R. T. 1433, lines 3-11]. This statement scarcely supports the General Counsel's position in that it is not known

attended Union meetings where Sloane spoke and that based upon Sloane's statements made concerning the cards:

> "I understand Mr. Sloane to say about the authorization [cards] that it was for the purposes of holding an election." [R. T. 1480, lines 12-14].

He further testified on cross-examination, based upon what he heard at three or four meetings he attended, it was his understanding that if the Union got over 50% of the cards, they would "demand an election" and he recalled nothing being mentioned about a 30% figure [R. T. 1484, lines 7-22].

Cuda testified that he signed his card at a Union meeting and that based upon what was said at that meeting, his "recollection was that by signing the card, it gives us the right to have an election in the shop." [R. T. 1503, lines 3-22]. On cross-examination, he could not recall Sloane or anyone else saying that if more than 50% of the cards were gotten, the Union would ask the company to recognize it [R. T. 1504, line 18, to 1505, line 7].

Garger also was present at Union meetings where Sloane spoke and recalls him saying:

> "A. Well, in order to have an election we would have to have at least 30 or 33 per cent. I couldn't tell you for sure, the authorization cards signed, so the Labor Board would conduct an election." [R. T. 1518, lines 2-5].

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at which of the many meetings Sloane made this statement and to how many employees he made it or if he just made the statement to Booze. Moreover, it certainly did not, nor could it, enlighten Booze or any other employee that the cards would be used for any other purpose than to have an election. Indeed, even if Sloane were credited against the overhwelming evidence, it scarcely supports the General Counsel's position, as the court in *Crawford, supra,* emphasized where essentially the same situa-

(This footnote is continued on the next page)

Berno attended the meeting of March 14, 1965. He testified that at that meeting, R. Empl. Ex. 6 was distributed to each of the employees attending the meeting [R. T. 1723-1724]. He further testified on direct examination that at that meeting the Union speakers said that if they had enough shops going that they would force the Southern California Tool and Die Association into a master shop agreement and that Sloane had said, among other things, that a letter had been sent "the previous Friday, petitioning for an election . . ." [R. T. 1725-1726]. On cross-examination, Berno reiterated his testimony. [R. T. 1777].

Thus, when the record is reviewed, the overwhelming weight of evidence points clearly to the fact that Sloane, rather than contradicting the deception set forth in R. Empl. Exs. 4, 5, and 6, and rather than explaining to the employees that the cards could or would be used for a purpose other than an election, compounded these misrepresentations by dinning into the ears of these employees at organizational meetings that the sole purpose of obtaining cards was for one end, and one end alone, to have an election.

And the Union's not so subtle method of deception was carried on in the plant by Union organizers and adherents who sought to get other employees to sign cards. Constantly and consistently, Union solicitors inside the plant impressed upon often reluctant fellow employees the asserted fact that cards were only to gain an election. For example, Christenson, who at the time of the hearing was working for another company, testified that Cantrell, one of the leading Union supporters in the plant, several times approached him and

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tion existed. Moreover, the Trial Examiner expressly found that Sloane told the employees that the Union was seeking representation, "and that this would come through elections conducted by the [Board]". [C. T. 24, line 56, to 25, line 4].

asked him to sign a card. Christenson told him that he would not sign one, but Cantrell said, on one occasion, that if Christenson did not sign one, then Cantrell himself would sign one for him and send it in. He further told Christenson that if Christenson signed the card, he would be under no obligation whatsoever and all it would do would have the effect of putting him on the mailing list [R. T. 1458, line 18, to 1459, line 9]. Christenson further testified that both Irving Klein and Ahlstrom, two other strong Union adherents who were attempting to have other employees sign cards, sought to have Christenson sign one as well and told him in the presence of many other employees (including Estrada) that "if I signed the card, I wouldn't be under any obligation; just sign it and I would be on the mailing list and at that time there would be a vote to see if the Union would come in or not." [R. T. 1460, line 24, to 1461, line 19]. On cross-examination, Christenson reiterated his testimony [R. T. 1464, lines 7-17; 1465, line 3, to 1468, line 23].

Garrett testified that during the time that cards were being passed out, George Wilson, another Union adherent, requested him to sign a card and when Garrett indicated he wanted more information as to the Union before signing, Wilson advised him that by signing a card, he would be on the mailing list and would have the information mailed to his home. Wilson stated to Garrett that "If there were enough cards within a certain length of time, the Company would be petitioned for an election." [R. T. 1419, line 18, to 1421, line 6]. An offer of proof was made at this point that Garrett signed the card to enlighten himself and would not have signed it if he thought there would not have been an election. The offer of proof was rejected [R. T. 1421, lines 17-20]. A similar offer of proof in regard to Haeler was made and rejected [R. T. 1795].

As pointed out elsewhere in this brief, Homnan (Narathip) was extremely limited in his ability both to speak and understand English and did not make out his own card but that his fellow Thai countryman (Anothaiwongs) did. Homnan, who admitted and whose testimony makes obvious that he had virtually no understanding about unions, heard fellow employees talking about an election and, based on that, Homnan signed a card. (The last statement was considered "going to intent" and the General Counsel's objection was sustained.) [R. T. 495, line 2, to 496, line 16]. On recross-examination, Homnan reiterated that before signing his card, he had heard talk about an election and that he was not very clear about the Union [R. T. 498, lines 9-24]. Once again, the General Counsel's objection was sustained to the question to this witness as to the reason for his filling out a card [R. T. 500].

An offer of proof was made, though rejected, that the employee Hunt was approached by Voegeli, a fellow employee in support of the Union, and was told that the card was only for the purpose of bringing about an election and that it didn't mean anything else [R. T. 1475, line 2, to 1476, line 19].

Knoles (Knowles), a retired employee of Petitioner at the time of the hearing, testified at the time he signed his card he had been under the impression that the Union was seeking a unit for the entire Southern California tool and die industry [R. T. 414, lines 14-22; 416, line 23, to 417, line 6] and based upon the fact that there would be an election in the entire industry, he signed a card [R. T. 417, lines 20-25]. This impression by Knoles was obtained from what employees were saying and from the Union literature that had been posted in the restrooms [R. T. 419, line 20, to 420, line 8]. When Voegeli approached him and

asked him to sign the card [R. T. 418, lines 24-25], in answer to the General Counsel's question as to whether Voegeli told him the card was "only for an election," Knoles replied, "He said it was for an election—so we could have an election. . . . We wanted an election for Union representation." [R. T. 422, line 21, to 423, line 18].

An offer of proof was made that Mancini was presented with a card by George Wilson and was told by the latter that "the card means nothing at all; it is simply to bring about an election." The offer of proof was rejected [R. T. 1487, lines 3-23]. Mansfield testified that he discussed the cards with other employees, at least a dozen times, and that it was repeatedly stated that the purpose of the card was for the "right to petition an NLRB election, a very common procedure." When asked his understanding of the card when he signed it, an objection was sustained by the Trial Examiner who recognized that there might be an "inconsistency of [his own] ruling on this question." [R. T. 627]. Mellone testified that Irving Klein gave him a card and:

> "Mr. Klein said that there was a percentage of cards needed for an election. He told me that nobody would see the card; that it would be noncommittal; only as an intention on my part for the union representatives—to have them have an election." [R. T. 1437, lines 4-8].

Polony testified that he was concerned by the fact that the card stated that it authorized the UAW to represent him; accordingly, he asked a number of fellow employees what it meant and was told that the card itself "didn't mean a thing." This statement was made to him by those employees who were urging him to sign. On cross-examination by the General Counsel, Polony testified:

Q. Do you recall who told you the card was for an election?

A. I couldn't tell you which exact guy it was, because I might tell you the wrong guy, but I know it was one of the guys that was strongly for the Union.

Q. You don't know which employee told you that; is that correct?

A. Not the particular one, but it was—there were at least three of them.

Q. What did this employee tell you about the card?

A. Well, when I asked him about the authorization without an election, he told me, 'Don't worry about that. It is just a formality. We have got to have an election.' " [R. T. 1378, lines 4-15].

An offer of proof was made, though rejected, that Polony signed the card solely because of what was told him, to wit, that the card was simply to have an election and had no other meaning [R. T. 1374]. Rhedin, who testified that he did not read the card carefully, was presented his card by Voegeli who told him that "they were trying to get an election." For this reason, Rhedin signed. An offer of proof was made that he would not have signed the card if he did not think there would be an election. Based upon what he was told, the offer was rejected [R. T. 1449, line 10, to 1451, line 1]. Similar testimony was given by Scovel and Senyk but offers of proof were rejected to the effect that each of them was told by the person who was seeking their signatures on cards that the purpose of the card was merely for an election [R. T. 1403; 1493]. Virgil testified on direct examination that at the time he signed there had been a great deal of talk in the plant that the purpose of signing cards was to bring about an election [R. T. 380]. The Trial Examiner

sustained the objection to Petitioner's question of Virgil as to whether or not he would have signed if he thought there would not have been an election [R. T. 382]. Virgil testified that Johnson told him when he requested that Virgil sign a card that "it would authorize the Union to come into the shop with enough cards—with enough cards it would bring in an election." [R. T. 382, line 19, to 383, line 3].

Taking all the above evidence together, there is no doubt the Union deliberately and its adherents (possibly innocently) duped the employees of the plant into believing that, notwithstanding the language of the cards, they were to be used solely to gain an election.[12] At this stage, to utilize these cards to assert that the Union had a true majority of employees who desired that the UAW represent them for collective bargaining purposes would be to reside in an Alice in Wonderland world. Neither the Board nor the courts should lend support to this type of constructive, if not actual, fraud. Thus, it is Petitioner's position, upheld by many circuit courts, that the cards, *generally,* under these circumstances, may not be given effect, as the General Counsel would desire. See *Bauer Welding and Metal Fabricators, Inc.; Crawford Manufacturing Co.; Shelby Manufacturing Company, supra.*

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[12]The record shows that other employees were also victims of other types of misrepresentations and coercion that affected the validity of their cards. For example, an offer of proof was made that Ampthor signed his card in order to get employees off his back who were repeatedly pestering him to sign [R. T. 651; 1237]. Anothaiwongs told supervisor Isaac that employees were bothering him to sign, that they were very "nasty" to him and that he wanted to keep the Union adherents off his back [R. T. 1564-1565]. An offer of proof was made that Seymour, who did not read his card, signed in order to remain on friendly terms with his fellow employees and did not want the UAW to represent him [R. T. 1442-1443]. An offer of proof was made that Addison was told by solicitor Kastendick that if he signed, the Union would have 100% of all employees [R. T. 1490].

Moreover, particular cards, at any rate, must be eliminated because the signators had individually been hoodwinked and misled as to their purpose. *Among* those particular cards which are not valid for the purpose of determining whether the Union had a majority are the following:

1. *G.C. 31—Knoles (Knowles)*—This witness, who testified that he signed under the impression that he thought it was going to be for the entire Southern California industry, and was so told, testified in answer to the General Counsel's questions that solicitor Voegeli told him that the purpose of the card was to have an election [R. T. 414, lines 14-22; 416, line 23, to 417, line 6; 417, lines 20-28; 418, lines 24-28; 419, line 20, to 420, line 8; 422, line 21, to 423, line 18]. Under these circumstances, in light of the entire record, Knoles' card cannot be counted.

2. *G.C. 34—Proudfoot*—This witness, who could not recall the date he signed the card and could not recall whether or not he read it, assumed that the card would "just lead to an election." When asked to state his understanding and meaning of the card, he testified that he understood that an election comes first [R. T. 480, line 12, to 481, line 16; 482, line 12, to 483, line 24]. In light of the fact that the authenticity of the card to begin with is in question because of the doubt as to its dating and, more particularly, in view of the fact that the witness did not read the card and his understanding was that it would "just lead to an election," this card, too, cannot have the evidentiary weight the General Counsel requests.

3. *G.C. 43—Booze*—This witness testified that Sloane "explained the cards to us. He said at such time we would have enough, we would have an election." [R. T. 1426, lines 12-13; 1427, lines 14-23;

1432, lines 2-19]. Under the circumstances, therefore, the card may not be added to the Union's total.

4. *G.C. 44—Cheetham*—This individual, who had been a member of labor unions both in England and Canada before coming to this country and was a shop steward in England, testified that based upon his Union experience in those countries, a secret election must be held before the Union is selected [R. T. 1410, line 3, to 1411, line 22; 1418]. Though the answer was stricken after objection, the witness testified that he would not have signed if he thought there would not be an election [R. T. 1412, line 20, to 1413, line 23]. As the Trial Examiner indicated, the man's past history certainly is a matter for consideration and, we submit, negates the purported effect of the language of the card, particularly in light of the Union's repeated statements as to its purpose.

5. *G.C. 45—Christenson*—This former employee during the winter-spring of 1965, was one of the leading anti-union employees in the plant. As indicated above, he was presented his card by solicitor Cantrell who, after Christenson said he was against the Union, told Christenson that he would be under no obligation whatsoever and it would only be putting him on the mailing list [R. T. 1458, line 18, to 1459, line 9]. Other employees who were distributing cards and urging him to sign told him the same thing and explained to him that there would be an election and he could then vote as he would want [R. T. 1460, line 24, to 1461, line 19; 1464, lines 6-17; 1465, line 3, to 1468, line 23]. It is clear, therefore, that this card must be discarded.

6. *G.C. 47—Cisneros*—This witness testified that based upon what he heard and what other employees

had told him about the Union, he understood there was going to be an election and he testified he recalled Sloane stating the Union was going to call an election and that all it needed was 51 per cent of the employees to "call an election." [R. T. 581, lines 19-24; 583, lines 4-14; 585, line 4, to 586, line 13]. Accordingly, Cisneros' card cannot have the evidentiary weight sought by the General Counsel.

7. *G.C. 52—Cuda*—This employee had been working for Petitioner for nine years, prior to which he lived in Canada and Czechoslovakia [R. T. 1501-1503]. He was a member of a union in Canada [R. T. 1504]. He testified that at the time he went to the meeting and based upon what he heard at the meeting, it was his understanding from what the speaker said that cards would give the employees the right to have an election. An offer of proof was made that he could not have signed a card had he interpreted the speaker any other way [R. T. 1503-1504]. Under these circumstances, in view of the Union's misrepresentations both in writing and verbally, the card can have no effect.

8. *G.C. 53—Dellomes*—This employee was one of the most vigorous anti-union employees in the plant. He testified that at three meetings he attended, he recalled Sloane stating that the Union had to have a certain number of cards "that were enough to gain an election and we need more cards to show a greater strength of the employees for the Union." Testimony showed that Dellomes got into vigorous arguments with Cantrell regarding the Union and that he told employees that he had signed the card solely to gain an election so that the Union matter could be gotten over with. In fact, he further testified that he told the employees he would quit his job rather than participate in

a union. He did not read the card and an objection was made and sustained to a question as to his understanding of its purpose [R. T. 1359-1361; 1364-1366; 1667]. It would be a travesty of justice to hold that Dellomes intended that the UAW represent him.

9. *G.C. 58—Garger*—This employee, who had come from Austria to this country approximately five years ago, testified that he was present at a meeting where Sloane stated that a certain number of cards had to be gotten so the "Labor Board could conduct an election." [R. T. 1518, lines 2-5]. Nothing was ever said that the Union could represent the employees without an election [R. T. 1517-1518]. An offer of proof was rejected to the effect that Garger understood the card to be for the purposes of an election. Under the circumstances of this case, we submit that there can be no question that Garger did not intend that the Union represent him without first gaining representation via a secret election.

10. *G.C. 59—Garrett*—When George Wilson handed Garrett a card and asked him to sign it, Garrett indicated he had not made up his mind and Wilson advised him that if he did sign, he would be on the mailing list [R. T. 1419, line 21, to 1420, line 17]. Subsequently, Wilson told him that if enough cards were gotten, the Company would be petitioned for an election [R. T. 1420, line 18, to 1421, line 6]. An offer of proof was rejected to the effect that Garrett signed solely to enlighten himself and would not have signed if he thought there was not going to be an election [R. T. 1421, lines 7-20]. This employee's card, as well, can have no legal effect.

11. *G.C. 66—Homnan (Narathip)*—This employee, who obviously had a very limited command of English

and who scarcely understood anything about unions, neither filled out nor read his card; indeed, he was unable to read, let alone understand, the words "collective bargaining representative." He was told by his fellow Thai countryman, Anothaiwongs, that there would be an election and he understood that the purpose of the card was to have an election [R. T. 489-500]. To hold that Homnan intended to authorize the UAW to represent him without (or even with) an election may possibly excite our imagination but it certainly cannot be upheld in law.

12. *G.C. 72—Kofink*—This witness of the General Counsel testified that Sloane stated that the purpose of the cards was to have an election and that the reason for obtaining cards was to bring about an election. The same thing was being said by other employees. Nothing was said by Sloane or anyone else that the Union could represent the employees without an election [R. T. 503; 507, line 19, to 508, line 22]. It was after these misrepresentations were made that Kofink signed; the evidence is clear that Kofink was actually against the Union and one of the reasons he left Germany was because of his experiences with unions there [R. T. 780]. To use Kofink's card to accomplish this coup d' etat in favor of the Union would be authorizing an Anschluss.

13. *G.C. 73—Kuhmann*—Kuhmann, who came over from Germany approximately five years ago and who is limited in his use of English [R. T. 563; 1683], was concerned about the pressure being applied on him by fellow employees to sign a card. An offer of proof was made and rejected that at the time he signed, he had no intention of becoming a member of the Union though he did think that the Union would get him more money. His understanding of the card and the

concept of authorizing the UAW to represent him in collective bargaining was, to say the least, vague [R. T. 563-566]. It is submitted that there is an insufficient degree of intent and clarity so as to permit Kuhmann's card to be used on behalf of the Union.

14. *G.C. 75—Lawrence*—This employee testified, both on direct and cross-examination, that he did not recall reading the authorization language on the card [R. T. 1481; 1484]. He attended three or four meetings and signed a card at one of the meetings; he understood Sloane to state that the cards were for the purpose of having an election [R. T. 1479, line 16, to 1480, line 15]. It was his understanding, based upon what Sloane said, that if the Union got over 50% of the employees' cards, it would demand an election [R. T. 1484]. An offer of proof was made and rejected that had Lawrence known that the Union could represent him without an election, he would not have signed [R. T. 1482]. It is quite clear that Lawrence was the victim of misrepresentation and that it would be highly improper and contrary to this employee's rights, to use this card as the UAW desires.

15. *G.C. 83—Polony*—This employee, who testified that he was concerned about the language on the card, stated that employees who were trying to convince him to sign one told him that the authorization language "didn't mean a thing" and that the card was strictly for an election; the card was just a formality to gain an election [R. T. 1372-1373; 1375-1376]. An offer of proof was made that Polony signed based upon these representations and that he thought that by signing, he would merely be bringing about an election [R. T. 1374]. It would be grossly improper to hold that Polony, who made every effort to ascertain the true meaning of the cards and who, based upon misrepresenta-

tions, signed on, should now be told that his reason for signing has no meaning.

16. *G.C. 84—Rhedin*—This employee testified he did not read his card but that when solicitor Voegeli asked him to sign, he told Rhedin that "they are trying to bring about an election." An offer of proof was made that he would not have signed a card except for his understanding that there would be an election [R. T. 1449-1450]. This card, too, cannot be used to favor the Union's cause.

17. *G.C. 91—Virgil*—This witness testified that at the meeting he attended, Sloane stressed the importance of the cards and stated that the more the Union had, the greater its change of winning an election. Sloane said nothing about the employees being represented by the Union without an election [R. T. 374, lines 2-11]. He further testified that at the time he was given a card, he stated that he actually was against the Union [R. T. 378, lines 17-21]. He was also told by the person who gave him the card that if the Union got enough cards, "it would bring about an election." [R. T. 382, line 19, to 383, line 3]. And throughout the period of time that cards were being distributed and until the time he signed one, a number of employees around the shop were stating that the purpose for the cards was to bring about an election [R. T. 380-381]. Virgil's card cannot properly be used to support the Union's alleged majority.

8. *G.C. 93—Vogl*—The Trial Examiner sustained objections to Petitioner's questions to this witness, both as to his understanding of the card and as to what he believed would happen after he signed one [R. T. 555-556]. An offer of proof was made and rejected that the witness' understanding of the card was that he was authorizing the Union to conduct an elec-

tion and that was his sole purpose for signing. He was not informed that the Union could come in without an election when he signed [R. T. 556]. This witness' testimony made it quite clear that he did not intend by signing to authorize the UAW to act as his collective bargaining agent.

19. *G.C. 95—Robert Weymar*—Weymar testified, both on cross and redirect examination, that Sloane made it quite clear that the purpose of the card was to have an election and that Sloane did not indicate any way the Union could become the collective bargaining agent without an election [R. T. 529, lines 8-11; 529, line 19, to 530, line 13; 531, lines 14-23]. He further testified that he discussed with perhaps as many as ten other employees the purpose of the card and that there would be an election, all these discussions during the period of time that the Union was soliciting cards [R. T. 522, line 8, to 523, line 14; 541, lines 17-22]. Based upon the misrepresentations made to him by Sloane, to say nothing of the "general atmosphere" regarding the "forthcoming" election, G.C. 95 does not represent the true intent of Weymar to designate the Union as his bargaining agent.

The foregoing evidence, taken separately or together, indicates beyond a shadow of a doubt that the Union, clearly through design, and its adherents, perhaps through innocence, perpetrated specific acts and created a general atmosphere that can only be labeled false and misleading. The cards, therefore, are not only under a cloud of unreliability but in the above specific cases must necessarily be discarded. Though at times the signators' subjective thoughts are intertwined with the objective misrepresentation set forth by the Union and its adherents, such evidence should be weighed together as case authority now holds.

The Eighth Circuit in *Bauer Welding and Metal Fabricators, Inc. v. NLRB, supra,* was met with a

very similar case. There, as allegedly here, there were 8(a)(1) and 8(a)(2) violations. There, the Union lost the election by a vote of 12 to 11. (Here, the Union lost the vote 59 to 40.) There, as here, the Union invoked the doctrine of *Bernel Foam* and, as here, the cards themselves were unambiguous. There, as here, the Union, however, distributed letters and bulletins which clearly purported to emphasize an election to the exclusion of recognition without an election. Indeed, R. Empl. Ex. 6, as well as R. Empl. Exs. 4 and 5, in the instant case are far more misleading and a far greater misrepresentation of the true facts than is the letter that the Eighth Circuit relied upon in holding that the cards must be discarded because of the misleading nature of the Union's communications to the employees.[13]

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[13]The initial Union letter to the employees in that case stated:
"Dear Friends:
"YOU CAN HAVE A UNION IN YOUR PLANT IF YOU WANT ONE!
"Just fill out the enclosed authorization card and return it to us. The card will then be turned over to the National Labor Relations Board, a branch of the United States Government.
"This is your right under the law. The National Labor Relations Board will then conduct an election in your plant by secret ballot.
"However, the United States Government will conduct an election *only* if we show them that the employees have asked us to represent them. Your employer will never see these cards.
"If the majority of the employees vote to be represented by the Union, the United States Government will then certify the Union as the bargaining agent for the employees.
"The Sheet Metal Workers' Union understands your problems and is standing by ready to help you. The sooner we get the cards back, the sooner Uncle Sam will conduct an election in your plant, and we will be able to help you.
"You will choose your shop stewards and negotiating committee. The Union will work with you to negotiate your own Union contract and wages and working conditions you will not be ashamed to work under.
"REMEMBER—Together we stand united—alone the Company owns you! BELONGING TO THE RIGHT UNION DOESN'T COST—IT PAYS!"

And there, as here, the Petitioner urged that based upon the employees' own testimony, cards were signed because of what the Union representatives and adherents had said; employees were under the belief that they were merely indicating their desire for an election. The Court said:

> "In support of the above determination, we note that no less than six of the petitioner's employees testified before the Examiner that they signed and returned their cards to the Union believing only that they were indicating their desire for an election. On of the respondent's own witnesses, David Nelson, testified on direct examination:
>
> 'Q. At the time that you signed that card, did you personally want the union to represent you?
>
> A. I wasn't sure, because I didn't know anything about it. I never worked in a union shop before, so I had no knowledge of it, outside of the letter which I had received with it. I talked to very few, so my information was very scarce.' "

The Court recognized that under the circumstances, some subjective evidence was being accepted by it. Noting that the rule is generally that subjective type evidence cannot negate the action of signing a card, the Court stressed that where there are misrepresentations, then to disallow such employee testimony as to their purpose for signing would constitute nothing less than an invitation to fraud on the part of unions. The Court said:

> "The Board objects to the admission of such testimony on the basis of language to which we lend approval in *Colson Corp. v. N.L.R.B., supra,* at page 135 of 347 F.2d, wherein we acknowledge that an employee's after-thoughts as to why he

signed a union authorization card would not negate his overt action of having signed the card. There can be no doubt that this is the general rule without misrepresentation being present. Misrepresentations, however, are present herein to the extent that petitioner's employees relied on the letter and believed that they were only showing a desire to have an election by signing the cards. Without this qualification, a union could be blatantly guilty of the most flagrant misrepresentations and be protected through the disallowance of any employee's testimony, once the employee signed the authorization card. Cf., Restatement of Torts, §525 1938). See, *N.L.R.B. v. Peterson Bros., Inc.,* 5 Cir., 1965, 342 F2d, 221, 224."

The Court went on to point out:

"Even without considering the testimony of the employees as to why they signed the cards, there still is strong and persuasive evidence indicating that many of the employees who signed the cards did not intend anything more than just authorizing an election by their act. The strongest evidence is the May 19, 1964 letter itself. Further evidence indicates that Johnson, who signed the letter, told Gerald Wachowiak, in a telephone conversation which took place on or about June 2, 1964, that:

'A. Well, he said that they had a majority of the cards, and that after he received a few more cards, there would be an election.

Q. Mr. Johnson told you at that point that there would be an election, is that correct?

A. Yes. . . .'

"In *N.L.R.B. v. Peterson Bros., Inc., supra,* the court held that because of an ambiguity in the authorization card the holding of the Board

as to representation was clearly erroneous. Therein Chief Justice Tuttle stated, at page 224 of 342 F.2d:

> 'In view of the language on the face of the card that "this is not an application for membership" and the language that in the alternative it is "for an NLRB election" we think there was a burden on the General Counsel to establish by a preponderance of the evidence that the signer of the card did, in effect, what he would have done by voting for the union in a Board election. We think that in refusing to consider this subjective intent of the signer of the card, in light of the ambiguity on the face of the card, the Board erred. Upon a careful examination of the record we conclude that the Trial Examiner correctly found that the designation cards signed by Rhodes and Wright were not valid designations for the union. We conclude that the Board's finding to the contrary is not based on substantial evidence on the record as a whole.'

The court denied enforcement of the § 8(a)(5) charges. In so doing, it cited with approval *N.L.R.B. v. Koehler, supra.* In critical mood, Judge Tuttle stated at page 225:

> 'It would be very simple for the union to prepare a card that in an unambiguous form would authorize union representation as a bargaining agent. If the union also wished to have cards signed to call an election this would also be a very simple matter. There can be little excuse for combining the two in a card that makes possible the misrepresentation that the Board found to have existed. . . .'

> In the instant case the authorization card clearly and without ambiguity designated the Union as the employees' bargaining agent. The covering letter, however, is most ambiguous and most misleading. It could well be classified as intentional double-talk. The effect of the covering letter herein is no different from the effect of the authorization card in *Peterson Bros.*"

Such is undoubtedly the case here; indeed, the Union's misrepresentations here were more pronounced, more consistent and, clearly, every bit as effective.

Thus, in summary as to whether the Union had a majority at the critical time, we note again that the General Counsel presented 65 cards which, arguably, evidence exists in regard to their authenticity. As to many of these cards, however, their authenticity is in question in that it was supported solely upon the testimony of the General Counsel's handwriting expert. Since Petitioner was improperly and prejudicially prevented from adequately cross-examining that witness, we submit that many of these cards have not passed the test required and their use is precluded. *Cf. Maphis Chapman Corp. v. NLRB,* 368 F. 2d 298 (4th Cir., 1966).

In any event, in light of the gross and consistent misrepresentations, which, at best, can be called deliberate double-talk on the part of the Union, none of these cards can truly be said to represent the intent of the signators, particularly when not supported by independent evidence. The Trial Examiner's self-satisfying reasoning that "intelligent" employees could not be mislead is a sangfroid that excites our imagination but insults our intelligence.

At any rate, however, the 19 cards where specific misrepresentation was shown (*in addition* to the Union's

false and misleading written communications) must be subtracted from the 65 figure. In ascertaining whether the Union had a majority of the employees, to include in any such tabulation the cards of the most violent anti-union employees in the shop—who at all times stated they were signing solely to get the election over with—(Dellomes [R. T. 1359-1361; 1364-1366; 1667]; Christensen [R. T. 1458, line 18, to 1461, line 19; 1464, lines 6-17; 1465, line 3, to 1468, line 23]), as well as employees who were plainly concerned about the language of the card, inquired about same and were told by Union adherents and organizers that the card was merely to have an election or that all it would mean would be that they would be on the mailing list (Polony [R. T. 1372-1376]; Garrett [R. T. 1419-1421]), and employees who are recent immigrants to this country, in many cases can scarcely speak or understand English, converse in another tongue and whose ideas of unionization are based upon knowledge of union organization in foreign countries wherein the concept of having a union represent employees without an election is either anathema or inconceivable or both (Cheetham [R. T. 1410, line 3, to 1411, line 22; 1412, line 20, to 1413, line 23; 1418]; Cuda [R. T. 1501-1504]; Garger [R. T. 1518]; Homnan [R. T. 489-500]; Kofink [R. T. 780]; Kuhmann [R. T. 563-566; 1683]; Proudfoot [R. T. 480, line 12, to 481, line 16; 482, line 12, to 483, line 24; 876, lines 17-23; 1332, lines 16-21; 1534, line 3, to 1535, line 22]; Vogl [R. T. 555-556]; Robert Weymar [R. T. 522-523; 541]), and/or were individually led to believe that the purpose of the card was to have an election, is indefensible. As a consequence, *at the most,* only 46 cards withstand the burden of proof as to their authenticity *and* validity.

As indicated at the beginning of this argument, 114 names remain on G.C. Ex. 101 as being part of the

unit. The status of only one employee is in question. Thus, for the General Counsel to show that the Union had a majority at the critical time, he would have had to present and prove both the authenticity and validity of at least 57 employee cards. He has patently failed. The Union never had a true majority.[14] Accordingly, the *Bernel Foam* doctrine cannot apply; at most, there should be a new election.

C. The Record Demonstrates That Petitioner Had a Good-Faith Doubt That the Union Represented a True Majority of Its Employees.

Assuming, without in any way conceding, that some violations of Section 8 are attributable to Petitioner and further assuming, purely *arguendo,* that the Union did represent a majority of its employees when such violations were allegedly committed, the Union still would not be entitled to an order acquiring Petitioner to bargain based on this record. A whole series of Board and Court decisions establish that an employer is obligated to honor the recognitional demand of a union only if it lacks a good faith doubt regarding the union's majority status. If such a good faith doubt exists the employer is privileged to insist upon a Board-conducted election. It is not only incumbent on the General Counsel, therefore, to prove a majority, and violations of Section 8 of the Act, to justify a bargaining order, but in addition to prove that the employer has re-

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[14]As the Associate General Counsel of the Board, in reviewing the law on this field, has stated, unions who desire to rely on authorization cards as proof of their majority "would be well advised . . . in soliciting employees, not to make representations which might raise questions as to whether the signing employees freely and genuinely intended to designate the union as their collective bargaining representative." Gordon, "Union Authorization Cards and the Duty to Bargain", Daily Labor Report, 33, BNA, February 15, 1968.

fused recognition in bad faith. *Aaron Bros. of California,* 158 NLRB 1077 (1966); *Strydel, Inc.,* 156 NLRB No. 114 (1966); *Harvard Coated Products Co.,* 156 NLRB 4 (1966); *Hammond & Irving, Inc.,* 154 NLRB 84 (1965); *NLRB v. Johnnie's Poultry Co.,* 344 F. 2d 617 (8th Cir. 1965); *Don The Beachcomber v. NLRB,* 390 F. 2d 344 (9th Cir. 1968).

Moreover, when the employer, as here, establishes by uncontradicted evidence ample independent grounds for a good faith doubt it is not enough that the General Counsel merely counter with evidence of the commission of unfair labor practices. See *McQuay-Norris Mfg. Co.,* 157 NLRB 131 (1966), where the Board said:

> "Not every act of misconduct necessarily vitiates the (company's) good-faith. For, there are some situations in which the violations of the Act are not directly inconsistent with a good-faith doubt that the union represents a majority of the employees."

The Board added:

> "The doctrine that an employer will not be heard to plead a good-faith doubt that his employees wish to be represented by a union when he has engaged in unfair labor practices at the same time that the union has been pressing its claims is not to be applied mechanically in all cases. It is not a *per se* doctrine. *It must at least appear that the unfair labor practices were committed in an effort to dissipate the union's majority, and that the unfair labor practices were in fact responsible for the loss of the union's majority."* (Emphasis supplied)

For further explication of the Board's position, see *Hercules Packing Corp.,* 163 NLRB 35 (1967), *Monroe Manufacturing Co.,* 162 NLRB 8 (1966).

The Second Circuit, in *NLRB v. River Togs Inc.,* 382 F. 2d 198 (2nd Cir. 1967), placed the issue of good faith in proper and sharp focus. There, as here, the treatment of the good faith issue both by the Trial Examiner and the Board panel was cursory. There, as here, the Board merely referred to an extensive anti-union campaign and found without further discussion that the company's failure to accord recognition was grounded upon a desire to thwart unionization.

On the other hand, the Court analyzed the good faith issue at some length:

> ". . . We see no logical basis for the view that substantial evidence of good-faith doubt is negated solely by an employer's desire to thwart unionization either by proper or even by improper means. [The employer] had much reason to doubt the Union's claim to a valid majority. . . . His efforts to counter the Union, . . . were 'as consistent with a desire to prevent the acquisition of majority status as with a purpose to destroy a existing majority.' *Lesnick, supra,* 65 Mich. L. Rev. at 855. As Judge Learned Hand said in a similar context, his response 'however unlawful in itself it may have been, throws substantially no light on how far he thought the effort had succeeded to form a union. As a penalty it might be proper, but as a link in reasoning it seems to us immaterial.' *NLRB v. James Thompson & Co. supra,* 208 F.2d at 746."

Numerous recent Circuit cases have similarly questioned the probative value of contemporaneous unfair labor practices in determining an employer's good-faith doubt. A good-faith doubt has been sustained and a Section 8(a)(5) violation rejected consistently in these

cases even though the employer committed violations of the Act during the union election campaign. *Textile Workers Union v. NLRB,* 380 F. 2d 292 (2nd Cir., 1967); *NLRB v. Johnnie's Poultry Co.,* 344 F. 2d 617 (8th Cir., 1965); *NLRB v. Flomatic Corp.,* 347 F. 2d 74 (2nd Cir., 1965); *Lane Drug Co. v. NLRB,* ..... F. 2d ..... (6th Cir., 1968); *NLRB v. Shelby Manufacturing Company,* 390 F. 2d 595 (6th Cir., 1968); *NLRB v. Morris Novelty Co.,* 378 F. 2d 1000 (8th Cir., 1967).

The closely analogous decision of *Peoples Service Drug Stores, Inc. v. NLRB,* 375 F. 2d 551 (6th Cir., 1967) established guidelines which are appropriate and realistic and should apply in the instant case. There the Board found the employer had engaged in some 14 violations of Section 8(a)(1)! The Court sustained a majority of these findings. Nonetheless, it found no support for an 8(a)(5) finding:

> "The specific question before us is whether there was substantial evidence to support the finding of the Trial Examiner that there was no foundation for Peoples' alleged doubt that the union had a majority of its employees who desired representation by the union. The mere fact that Peoples was guilty of unfair labor practices in connection with the union organizational campaign is not sufficient in and of itself to negative a doubt on the part of management. [Citing cases.]
>
> "A significant number of employees testified that they signed the cards believing that their only effect would be to require a secret election under the auspices of the NLRB. Some employees testified that union organizers and fellow employees solicited union membership, stating that the effect of signing the authorization cards would be to se-

cure an election in which they would be free to vote for or against the union. The union and its organizers did not make known to all the employees that by presenting cards from a majority of Peoples' employees they could obtain recognition without an election. It appears from the testimony of a significant number of employees that they were misled by union organizers or fellow employees acting on behalf of the union into believing that the only purpose of signing the cards was to obtain an election. An important factor to be considered in determining whether an employer entertained a good faith doubt as to the union's majority status is whether the union misrepresented the purpose of the cards to the employees.

> 'The decisions of the Board as well as the opinions of the courts place more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards. If in fact misrepresentations are made by the union to employees to the effect that the only purpose of the card is to authorize the union to petition the Board for an election, the card will not be construed to authorize representation, even though it contains language to that effect. [citing cases]

". . . The Examiner says that the widespread coercion indulged in by Peoples compels the conclusion that the advocacy of an election was a device to undermine the Union and to gain time and that its expressed doubt as to a majority was not made in good faith. This is pure supposition and, unlike *NLRB v. Cumberland Shoe Corporation, supra,* we do not find evidence to support such an inference.

"The Examiner discredits Mr. Weaver's reasons for doubt. The Examiner assumes that the employees who told management that their cards did not represent their true intentions, did so to avoid the displeasure of their employer. It may as well be assumed that they were pressured into signing by fellow employees and union representatives. *This is not a criminal case where Mr. Weaver must be persuaded beyond a reasonable doubt. An honest doubt is all that is required. A doubt in the mind of an individual is a subjective matter and cannot be precisely determined. While the absence of a doubt may be proved by circumstantial evidence, we conclude that, under the facts of this case, the Examiner's finding that Mr. Weaver, on behalf of Peoples, did not have a good-faith doubt is not supported by substantial evidence.*" (Emphasis added).

The instant case cannot be distinguished from that just cited. If anything, it presents a stronger set of facts.

Assuming, *arguendo,* that the Trial Examiner correctly found that Petitioner violated Sections 8(a)(1) and (2)—and his finding of bad faith was bottomed entirely upon violations of these particular Sections of the Act [C. T. 30]—such violations, at best, were more technical than coercive. Most of the conduct alleged (but hardly proven) was either of an isolated nature or was drawn from statements in campaign literature that were, at the most, of a kind so close to the borderline of free speech that it cannot be ascertained whether they were violative of the Act or protected by it. See, *e.g., NLRB v. TRW Semiconductors, Inc.,* 385 F. 2d 753 (9th Cir., 1967). Such acts of misconduct sparingly committed do not destroy Petitioner's good faith when all factors are considered.

To establish Petitioner's good faith doubt in proper perspective, we shall portray the sequence of events leading to that doubt. The entire picture provides a basis not only for a good faith doubt but gave Petitioner every reason to be *virtually certain* that the Union did not have a majority at the time of its demand or at any time prior thereto. Attached to this brief is Appendix "B," a detailed list of all the pertinent and multitudinous transcript references depicting the undenied fact that virtually all Petitioner's employees had a practice of freely offering information to Petitioner regarding the Union. The nature of this friendly and personal employer-employee relationship was instrumental in producing Petitioner's good faith doubt and served as an objective basis for the compilation of Petitioner's survey, R. Empl. Ex. 7, *infra*.[15]

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[15]In addition, there is considerable uncontradicted testimony that Union adherents were told by management representatives that participation in union activities was their right and privilege. See, *e.g.,* testimony *re* Burke [R. T. 1658-1659]; Cheetham [R. T. 1410-1411, 777!]; Crandall [R. T. 1672]; Christopher [R. T. 1689-1690] and Rawl [R. T. 1687-1688]. Management officials also reprimanded, at least on one occasion, employees who were against the Union for physically threatening employees who were in favor of the Union [R. T. 1319-1320]. And throughout the entire preelection campaign, Petitioner voluntarily made available to the Union a large bulletin board which enabled the Union to put up numerous announcements and campaign propaganda right in the middle of Petitioner's plant [R. T. 821-822].

Moreover, anti-union employees were as vocal as avid Union supporters. See, *e.g.,* testimony of Addison [R. T. 1491]; Burns [R. T. 1524-1525; 1593]; Pashone [R. T. 1508-1509]; Poirier [R. T. 1532-1533]; Whiteman [R. T. 1435-1436]; Fehland [R. T. 1397-1398]. A number of employees announced to Petitioner's officials that if the Union got in, they would quit their jobs. See Clendenin [R. T. 1669-1671]; Dellomes [R. T. 1359]; Gardner [R. T. 1598]; Hibbard [R. T. 787; 1735-1736]; Kuhmann [R. T. 786] and Meyer [R. T. 1686-1687].

All of this evidence supporting good faith was conveniently ignored by the Board.

Petitioner was first made aware of general union activity in the industry late in 1964, through an article in a local newspaper concerning the UAW's organizational efforts in the tool and die industry in Southern California. During this period of time, other articles appeared in newspapers publicizing that organization's drive, but there was no Union activity at Petitioner's plant [R. T. 753; 901-930].

The first indication of Union activity in the plant was on February 22, 1965, when Weitzel, Petitioner's president, informed Fink, its general manager, that he, Weitzel, had received an anonymous phone call from a woman telling him of Union organization or activity in the plant [R. T. 765-766; 909-910]. Fink, in turn, called Bob Howland, plant superintendent, into his office and told him what Weitzel had said about the call [R. T. 757-758; 910-911]. Howland testified that thereafter beginning around February 22 to 24, 1965, many employees began asking him questions concerning the Union [R. T. 1218].

Both Fink and Howland testified that on or about March 3, 1965, Howland gave to Fink a copy of R. Empl. Ex. 4 [R. T. 758; 1156] and on or about March 12 a copy of R. Empl. Ex. 5, Union campaign material [R. T. 759-760; 1156-1157]. Howland found both of these copies around the shop [R. T. 1295]. The documents both allude to a Board election.

On the morning of March 15, 1965, a Monday morning, between 7:00 and 8:00 A.M., Howard Berno, whom the Trial Examiner found to be a regular employee [C. T. 35, line 3], came into Fink's office, as he and other employees frequently had done in the past. Berno informed Fink that he had attended a Union meeting the previous day (March 14th) as he, Berno, wanted to know more about the Union and to be further informed

[R. T. 771; R. T. 852-853; R. T. 1125-1126; R. T. 1777-1779].

Berno informed Fink that a union agent, Sloane, had spoken there and said there was going to be "a petition for an election." He gave Fink a copy of R. Empl. Ex. 6 that had been distributed to the employees. Berno also told Fink that some employees there had told him that they had gone to the meeting merely to get information and were not for the Union [R. T. 770-773; 852-853; R. T. 1723-1726; 1777-1779].

As soon as Berno left the office, Fink called Howland in and repeated what Berno had stated [R. T. 1773; R. T. 855; R. T. 922-923; R. T. 1157]. Fink asked Howland's opinion about the matter and Howland said that based upon his numerous conversations with employees, leadmen and supervisors, he, Howland, did not believe the Union had "enough people for a petition for an election." [R. T. 773-774; 854-855; R. T. 1157-1158; 1220-1222]. Fink asked Howland to return to his office that evening to discuss the matter further [R. T. 773-774; 853; R. T. 1157].

At that point, Howland, in order to verify his opinion that the Union did not have a majority, went to Berno, and told him to prepare a list of direct personnel and maintenance employees, as Howland wished to prepare a survey of Union strength. He instructed Berno to leave room on the right-hand side of this list to put "for" or "against" [R. T. 1158-1160; 1221-1223; R. T. 1727]. During the rest of the morning, Berno, in addition to his other duties, prepared R. Empl. Ex. 7 (minus the handwriting on the right-hand side under the column "for" or "against" the Union, and other written notations.) Berno, himself, without instructions from Howland, put on the R. Empl. Ex. 7, an asterisk beside the names of certain employees because

Berno thought that Howland would be interested in knowing how many employees attended the meeting the day before. After lunch he gave Howland copies of the list [R. T. 1158-1161; R. T. 1727; 1747-1749].

That afternoon, for approximately two or three hours, off and on, Howland filled in the column designed "for" or "against" the Union by marking down thereon beside each of the employees listed his opinion as to whether the employee was for or against the Union or was undecided [R. T. 1161; 1235-1236]. He made the tally from his recollection of prior conversations with employees and leadmen and others. During the day, he spoke to certain supervisors and lead personnel and asked their opinion on particular employees about whom Howland felt he needed more information [R. T. 1222-1224; R. T. 1295-1298].

That evening, Howland met with Fink in the latter's office and brought with him R. Empl. Ex. 7 which now contained Howland's designations. Fink never knew of the existence of this document before Howland brought it into his office that evening [R. T. 774; R. T. 888]. The list contained all of the names of employees Howland thought would be voting, *i.e.,* the skilled people [R. T. 774; R. T. 898-899; R. T. 1161]. The testimony also shows that the small notations (principally the word "no") beside various employees' names, were put in by Fink himself during the next three or four days [R. T. 775-776].

There was and is no question as to the authenticity of R. Empl. Ex. 7 nor the purpose for which it was prepared. Fink, Howland and Berno all testified consistently and without any contradiction as to its proper purpose and the manner in which it came into being. The results depicted by R. Empl. Ex. 7 show beyond peradventure both the good faith approach and doubt of

Petitioner. Try as did the counsel for the General Counsel and the charging party to undermine the veracity of R. Empl. Ex. 7, it remains proof positive that as of March 15th, *the day prior to receipt of the Union's demand letter,* Petitioner clearly believed that a majority of employees were not in favor of the Union.

While, the Trial Examiner ignored virtually all the above evidence, it is important to note, that he kid *not* discredit R. Empl. Ex. 7 or the evidence from which that exhibit had been derived.

Petitioner's estimation of the sentiments of each and every employee there considered, together with all supporting evidence is incorporated as Appendix "C" to this brief. This breakdown and the data which engendered it is perhaps the most significant evidence of the entire case. Research has uncovered no other case where the objectivity of an employer in formulating a good faith doubt has been more clearly established. The evidence was never denied. It was never contradicted. Although unaccountably tossed aside by the Board, it leaves no doubt that the Petitioner had a good faith doubt as to the Union's alleged majority. The Fink-Howland conclusion arrived at on the evening of March 15, and further reiterated over the next few days, that the Union "obviously did not have a majority" is fully supported on the record and was a conclusion that was arithmetically sound and founded upon good faith [R. T. 789-790; R. T. 925; R. T. 1172].

Indeed, a careful analysis and computation of the appended evidence shows that of the 113-114 employees stipulated to be in the unit the union would have needed 57 or 58 employees for a majority. But the evidence shows that *no less than 59 employees had come out openly against the Union.* These employees—and in virtually every case the evidence is without contradiction—had freely and openly communicated this to the Petitioner,

through its supervisors, leadmen and others.[16] In addition, another ten employees had let management know, near the beginning of March, that they were undecided about the Union.[17]

Nearly half of the listed employees personally testified in support of Petitioner's conclusions. Moreover, another half dozen employees had vacillated, indicating on one or more occasions opposition to the Union, while at other times seeming to favor it.[18] Some fifteen employees gave no indication of their position—some were on sick leave, others had only recently been hired or could scarcely read or write.[19] So there were only between 24 and 28 employees who had indicated (either directly, by association with other employees, or sanguinity) their support of the Union's drive. Interestingly enough, 21 employees who signed cards clearly indicated to Petitioner they were against the Union while another 8 employees who signed cards indicated that they were undecided.[20]

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[16]Addison, Amthor, Berno, Booze, Bradley, Burns, Chavez, Cheetham, Christenson, Clendenin, Dale, Dellomes, Estrada, Fehland, Freeze, Gardner, Garrett, Gowen, Grice, Hibbard, Hoef, Hunt, Kevelighan, Kimura, Knoles, Kocsis, Kofink, Kruse, Kuhmann, Lamb (Harold), Lary, Lawrence, Letts, Mancini, Mansfield, Moran, Morris, Meyer, Newak, Pashone, Poirier, Polony, Proudfoot, Rhedin, Riegler, Schlapp, Scoggins, Scovel, Senyk, Seymour, Smith, Stow, Thomas, Vogl, Watts, Whiteman, Williams, Zadnik, Zirbel.

Not included in the total 59 employees who clearly stated their opposition to the Union, Fink and Howland also were told by the leadmen, later at the hearing stipulated as supervisors within the meaning of the Act, that they were against the Union. On March 15, neither Fink nor Howland knew the legal status of Negret, Woods, Zeman, Lawler, or Payton.

[17]Anothaiwongs, Cisneros, A. Crandall, D. Doebler, Gumm, Mellone, Osdale, Thiekotter, Virgil, U. Weymar.

[18]Conner, Gedminas, Gumm, Hirschmann, T. Klein, Herbert Lamb.

[19]Boone, Cuda, F. Doebler, Dominguez, Dufek, Ganske, Garger, Harrison, Hinsch, Homnan, Howard, Kojaku, O'Kane, Twardowski, Wiley.

[20]Amthor, Booze, Cheetham, Christenson, Dellomes, Estrada, Garrett, Hoef, Knoles, Kofink, Kuhmann, Lawrence, Polony,

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The record shows that *in at least 95 percent of the cases,* the conversations and employee statements communicated to Petitioner upon which it premised its good faith doubt occurred prior to March 8, that is, prior to the alleged commission of virtually all the alleged violations of the Act.[21]

Violations of the Act, even if they occurred and were committed, as the Board found, "to dilute whatever interest in the Union had been engendered among its employees [C. T. 30, lines 26-27] or if they "bespoke" a fear that the Union was achieving some measure of success in its organizing goals" [C. T. 30, lines 37-38] or if Petitioner "saw the union as a threat to its way of dealing with its employees" [C. T. 30, lines 58-59], in no way negate that doubt, once established. Such violations are absolutely irrelevant to the issue, once independent grounds for doubt are established, because they are, "just as consistent with a disbelief in the majority status of a union as [they are] with a belief in the majority status."[22] *Lane Drug Co. v. NLRB,* .... F. 2d .... (6th Cir. 1968); *NLRB v. S. S. Logan Packing Co.,* 386 F. 2d 562 (4th Cir. 1967); *NLRB v. River Togs, Inc.,* 382 F. 2d 198, 207 (2d Cir. 1967). Thus, the Board's conclusion is without ma-

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Proudfoot, Rhedin, Scoggins, Seymour, Smith, Vogl, Williams, Zirbel, Also, Anothaiwongs, Cisneros, A. Crandall, D. Doebler, Osdale, Thiekotter, Virgil, U. Weymar.

[21]In this connection there is completely absent from the Trial Examiner's decision any *finding* that the alleged unfair labor practices dissipated the alleged union majority.

[22]Indeed, the record discloses only one instance of an employee changing his mind because of the actions of any outside party. That was Kuhmann who changed in favor of Petitioner because he learned of Union seniority policy from someone outside the plant. [R. T. 564, line 1, to 565, line 6; 566, line 16, to 568, line 9]. Other employees who had signed cards indicated that the more the Union adherents campaigned, the less they favored the Union. See, *e.g.,* Booze [R. T. 1428, lines 3-15]; Cheetham [R. T. 1416, lines 3-22]; Kofink [R. T. 1575, lines 11-25]. See also R. T. 1579.

terial supporting evidence in this record, and it follows, therefore, that *Bernel Foam* rationale is inapplicable.

Even beyond this, Petitioner's position of doubt did not rest solely upon arithmetic, but also on the advice of experienced labor counsel. On March 16, the day following the meeting between Howland and Fink, Petitioner received the Union's demand letter [G.C. Ex. 38]. Fink immediately contacted Carl Gould of Hill, Farrer & Burrill, Petitioner's attorneys [R. T. 790, lines 11-21]. Fink, Howland, Gould and Weitzel met in Weitzel's office that evening [R. T. 1173, lines 12-25; 790, line 22, to 791, line 1].

Gould read G.C. Ex. 38 given to him by Fink and then asked Fink and Howland their opinion of the matter. Fink handed Gould R. Empl. Ex. 7, their survey, together with Union literature, R. Empl. Exs. 4, 5 and 6. Fink told Gould of many of the conversations that he, Howland, and others had with employees and how the survey had been prepared [R. T. 998, line 16, to 999, line 4; R. T. 1174, line 2, to 1175, line 7].

Gould read R. Empl. Exs. 4, 5 and 6, which pointedly and decidedly told Petitioner's employees of the aim of the Union: to gain an election. Both Fink and Howland told him of particular instances and the general atmosphere in the plant of employees believing that the entire thrust of the Union's organizational drive was for an election. Taking this evidence before him, Gould advised Fink and Howland that if the Union did have a majority of signed authorization cards, they were obtained through misrepresentation and the consistent barrage of Union propaganda to convince the employees that there would be an election.[23] Gould

[23]Gould was aware of two other factors which he weighed before advising Petitioner. One, the plant was a virtual United

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concluded that the Union did not have an uncoerced majority and advised that it would be illegal for Petitioner to recognize the Union as the collective bargaining representative of its employees without an election. Accordingly, Petitioner sent G.C. Ex. 39, dated March 19, to the Union, refusing its demand for recognition [R. T. 791, line 12, to 794, line 14; 886, line 16, to 888, line 18; 929, lines 24, to 934, line 5; 950, line 9, to 959, line 12; 994, line 19, to 999, line 4; 1174, line 1, to 1175, line 19].

Under the above circumstances, Petitioner had no duty whatsoever to recognize the Union; on the contrary, it had a duty *not* to recognize the Union: to have done so would have violated the rights of its employees and Section 8(a)(1) and (2) of the Act. *International Ladies Garment Workers v. NLRB,* 366 U.S. 731, 739 (1961).

In *Nahas Department Store No. 3,* 58 LRRM 1687 (1965), the Board adopted the Trial Examiner's recommendation that a complaint, containing an 8(a)(5) allegation, be dismissed. The Trial Examiner in that case stated, in language quite apposite here:

> "Upon all the evidence which is ample on this point, I find it also clear that at all times the Company had a good faith doubt that the Union possessed majority status in the unit. The testimony of Nansel and Nuss demonstrates conclusively that more than half the employees in the unit at various times had complained to them

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Nations with employees recently arrived from among other countries, Germany, Italy, Mexico, Thailand, Japan, Austria, France, Czechoslavakia, England and Canada. While proficient craftsmen, their knowledge either of the English language or American unionization, or both, was limited and they could be more easily misled. Too, Gould was advised, and it is true, that the Union was pressuring employees to sign authorization cards even after it had made its demand for recognition, which led him to seriously question whether the Union really had a majority of cards.

about 'being bothered' by the organizers, or had stated that they were not interested in the Union. Furthermore, some employees who had signed cards stated to Company officials thaty they thought the cards were merely for an election, which they considered an advantageous way of ending the Union's solicitation. Furthermore, the feverish activity of the Union agents in making solicitations in the store, long after the Union had claimed a majority, contributed to the decision of Nuss and Nansel that the Union, knowing what it did as evidenced in this record, the Company would have committed an unfair labor practice because it could not claim that it was unaware that the Union's claim of majority status was false. To have recognized the Union, under the circumstances here present, would have been most dangerous and foolhardy. Therefore, I find, that at all times from the date of the Union's demand for recognition until the date of the hearing the Company had a good faith doubt of the Union's majority status in the appropriate unit. (TXD - (S.F.) - 28-65, p. 16, l. 45 - p. 17, l. 5)"

Of note is that Petitioner's counsel, Gould, was attorney for Nahas in the cited case.

In sum, the Board has seriously erred in disregarding Petitioner's uncontradicted evidence that doubt of a true Union majority was founded in a good faith attempt to calculate employee sentiment and on advice of competent counsel, in favor of erroneous and, even more, irrelevant findings that certain unfair labor practices occurred in the preelection period. This Court should, therefore, deny that portion of the Board's order which would require Petitioner to bargain with the Union on this further ground.

PART 2.

THERE IS NO SUBSTANTIAL EVIDENTARY SUPPORT FOR FINDINGS THAT PETITIONER COMMITTED ANY UNFAIR LABOR PRACTICES.

The record reflects that during the period prior to the election, held in June 1965, both parties, Company and Union, conducted an aggressive campaign for employee votes. For its part, the Union initiated numerous organizational meetings and talks with employees, distributed an estimated 20-25 pieces of pro-Union literature through the mail and posted another 30-40 pieces of propaganda on the Union's side of the Company bulletin board [R. T. 821-822]. In turn, Petitioner likewise mounted a hard-hitting campaign, but one well within the limits of law and therefore protected, as the evidence amply demonstrates. The courts have emphasized repeatedly that an aggressive and partisan campaign on the part of an employer may not by itself be considered as evidence, either direct or indirect, or wrongful activity by the employer *Supernant Mfg. Co. v. NLRB,* 341 F. 2d 756, 759-60 (6th Cir., 1965); *Hendrix Mfg. Co. v. NLRB,* 321 F. 2d 100, 103 (5th Cir., 1963).

A. Purported Section 8(a)(1) Violations.

(1) Alleged Questioning in "Context of Threats".

The Board adopted without comment its Trial Examiner's finding that Petitioner had contravened Section 8(a)(1) for having, "questioned some of its employees concerning their interest in the Union and that because some of this questioning was in a context of threats that a union might force the [Petitioner] out of business it constituted interference, restraint and coercion of employees . . .". [C. T. 32, lines 19-23];

and for "attempting to induce the fear that the selection of the Union would result in the closing of the business and the loss of employment, and by using the devise of wage increases the [Petitioner] tried to frighten cozen, and allure the employees away from choosing the Union as bargaining representative." [C. T. 32, lines 40-44].

It is well established that there is no unfair labor practice when an employer questions employees concerning their interest in unions unless that questioning is coercive; that is, unless it contains a promise of benefit or threat of reprisal. Indeed, a questioning of interest, without more, is free speech protected by Section 8(c) of the Act. *Lane Drug Co. v. NLRB,* ..... F. 2d ..... (6th Cir., 1968); *Bourne Co. v. NLRB,* 332 F. 2d 47 (2d Cir., 1964). This court has rightfully pointed out in *Don The Beachcomber v. NLRB,* 390 F. 2d 344 (9th Cir., 1968) that,

> "Often the only manner in which an employer can support his good-faith doubt of union majority is by investigation. As long as his inquiry is not undertaken in a threatening manner, either open or implied, such an attempt to avert §8(a)(5) charges should not without more render an employer subject to attack under §8(a)(1)."

Further, a review of the various conversations referred to by the Trial Examiner discloses that in each instance one or a combination of the following factors were present to support their legality: (1) union information was volunteered by an employee, rather than solicited; (2) the talks took place in a casual and friendly context, absent threats and coercion; (3) the alleged questioning was conducted by an individual who was not aligned with management and for whose con-

duct it shared no responsibility.[24] See *NLRB v. Morris Novelty Co.*, 378 F. 2d 1000 (8th Cir., 1967).

The Board, adopting its Trial Examiner's view, agreed that these conversations, standing alone, did not amount to illegal activity. That is, *nothing said in the conversations themselves* was held to be a violation of Section 8(a)(1). The alleged vice was that the "questioning" took place in a surrounding "context of threats that a union might force [Petitioner] out of business." [C. T. 32, lines 19-23]. The Board discovers the foundation for this "context" in certain specified pieces of campaign literature distributed and speeches made by Petitioner during the pre-election period [C. T. 27, lines 20-28, line 63].

Particular emphasis is placed on literature which stressed that three other area tool and die shops, Falco, Mars and Alba, had discontinued operations shortly after

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[24]Space limitations preclude the detailing here of each such episode. The Court is respectfully referred to the following excerpts from the Reporter's Transcript which contain the testimony concerning the conversations upon which the Trial Examiner apparently grounded his findings: Cantrell-Fink, R. T. 121-123, 761-763 (Information volunteered—no threats or promises.); Berno-Schwartz-Cantrell, R. T. 1729-1751, 126 (Alleged questioning by Schwartz who was a visiting university professor not employed by or acting for Petitioner.) Klein-Howland, R. T. 274-275, 1112 (No question relating to union sympathy at all. Merely a noncoercive general query as to how a union could benefit Petitioner.); Reigler-Isak, R. T. 1562, lines 3-6, 1563, 1394-1395 (Question in native tongue to longtime German friend as to how he felt about the Union at a time when questioner was not even employed by Petitioner.); Virgil-Berno, R. T. 367, line 19, to 369, line 9, 370 (No questioning at all about union feelings—a conversation had *a year later*—in 1966—concerning whether Virgil knew union could get into plant without an election.); Ahlstrom-Howland, R. T. 405, 393, 1138-1139 (Both men testified their conversations were always conducted in a friendly and joking atmosphere.); Booze-Howland, R. T. 1428, line 13, to 1431, line 7 (No recall by employee Booze as to whether union information was volunteered or solicited and no coercion whatsoever.)

being organized by unions. Thus, an undated communication [G.C. Ex. 9] pointed to the Falco Tool & Die situation and stated that union promises to employees, like company promises, "depend on the ability of the company to continue in business and make a profit," and that because the company without a union could guarantee uninterrupted production and delivery to customers employee job security was every bit as good without, as with, a union contract [C. T. 27, lines 27-39].[25]

A subsequent letter to employees by General Manager Fink, dated May 12, again referred to Alba, Falco and Mars' inability to continue in business after the advent of a union [C. T. 27, lines 44-51; G.C. Ex. 14; R. T. 894]. The above communications were supplemented by a subsequent letter from W. Lee Campbell, Petitioner's Regional Sales Manager [G.C. Ex. 15] which touched upon potential concerns of customers about strikes, the meeting of production schedules and higher charges if the union campaign succeeded [C. T. 27, line 53, to 25, line 8].

Finally, on June 8, Falco's former President, Alex Skulsky, wrote a letter distributed to employees stating that Falco had prospered until a union was introduced into the plant and further relaying his feeling that a union was not needed and would cause disruption in operations [C. T. 28, lines 10-28].[26]

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[25]The Trial Examiner, notably first rejected G.C. Ex. 9 entirely [R. T. 722], then later received it only because of a statement in Answer 4 therein concerning seniority as related to Cantrell's discharge [R. T. 817, lines 22-25]. Yet answer *25* is quoted and stigmatized in his decision.

[26]Other references by the Trial Examiner to a June 8 letter of Fink's concerning the possibility of strikes, and to a June 10 speech of Weitzel's stating that problems could be resolved without a union, and asking for a personal vote of confidence [R. T. 28, lines 30-63] are not dealt with here, for they obviously contain no objectionable material and do not appear to have been relied upon to support the alleged theme of plant closure.

We first note that the timing of the communication of the Falco-Mars-Alba story was such that the Union had ample opportunity to reply or rebut it in any appropriate fashion. Its failure to do so reinforces the fact that Petitioner's assertions were true. Much more importantly, these communications were perfectly proper and constituted legitimate campaigning on the part of the employer. The Board has totally failed to grasp the crucial distinction here between illegal "threats" and lawful "predictions." This distinction has been carefully delineated in several thoughtful Board and Court cases decided since the one at bar arose.

For example, in *National Food Stores Inc.*, 169 NLRB No. 12 (1968), the Board, overruling its Trial Examiner, held that a pre-election letter and speeches which urged that the union was only interested in dues, and stressed, as the effects of unionization, strikes, violence, loss of benefits and plant closure were not coercive.

Southwire Co. v. NLRB, 383 F. 2d 235 (5th Cir., 1967) provides an enlightened court analysis of Section 8(c).[27] After first recognizing that there can be no unfair labor practice absent a threat of reprisal or promise of benefit and that both sides to a labor dispute have the right, arising under the First Amendment, to express opinions, the Court said:

> "The law has developed in this area to distinguish between a threat of action which the employer can impose or control and a prediction as to an event over which the employer has no control. The threat is not privileged but the prediction is."

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[27]Section 8(c) reads: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

We may properly inquire what threat of reprisal is contained in the literature and speeches quoted by the Board? Nothing there states that Petitioner would close its doors in the event of a union victory. On the contrary, excerpts from President Weitzel's talk of June 10 and Fink's letter of June 8, *not mentioned by the Board,* illustrate that Petitioner had no intention of discontinuing operations. Thus, Weitzel said:

> "I believe that this company has a great future ahead, and I expect to devote the rest of my life in the best interests of Mechanical Specialties Company." [G.C. Ex. 19, p. 2].

Fink's letter contained this sentence,

> "Let us all continue working together to keep our plant operating 'full bent' on a friendly, cooperative basis." [G.C. Ex. 17].

Viewing this campaign material in its entirety, it consisted of no more than predictions of what the union might or could do. Unsound union demands, unfounded grievances, union-caused inefficiency, strikes and their attendant dislocation of production and delivery schedules—all were the predicted causes of possible monetary job loss—each factor under the sole control of the Union, not the Company.

Virtually an identical situation was presented to this court in *NLRB v. TRW-Semiconductors, Inc.,* 385 F. 2d 753 (9th Cir., 1967). In words applying with equal force to the case at bar this Court said:

> "There is no suggestion [in employer literature] that the employer will reduce benefits or cut jobs if the employees vote for the union. *The prediction is that the union may or will cause such losses through strikes. There is also a prediction that the union's presence may or will cause loss of customers, to the possible or even probable det-*

> *riment of employees. Such arguments, too, are protected by Section 8(c).*" (citations omitted) (Emphasis supplied).

and further on:

> "The mere fact that campaign propaganda may induce fear—and be intended to induce fear—does not deprive it of the protection of Section 8(c). That is often the nature of campaign propaganda." "Section 8(c) does not protect only those views, arguments or opinions that are correct, nor does it forbid them because they are demonstrably incorrect. The remedy is for the union to answer them, not a cease and desist order."

And see exhaustive discussion of the case development of Section 8(c) set forth in *NLRB v. The Golub Corporation,* 388 F. 2d 921 (2nd Cir., 1967).

There can be no other conclusion, applying this authority, than that Petitioner's campaign statements were predictions, not threats, and, as such, privileged. When this erroneous finding of the Board falls, there collapses with it the threatening "context", the alleged existence of which was used by Respondent to stigmatize Petitioner's conversations with employees. Not only then is the pre-election literature vindicated but the instances of so-called questioning are rendered perfectly proper as well.

(2) The Wage Increase.

The Trial Examiner further found that a wage increase given by Petitioner on March 8, prior to the Union's demand for recognition, violated Section 8(a)-(1). This, even though there was presented to Petitioner at that time no question concerning representation and despite the Examiner's own all but bewildering statement that "it was [Petitioner's] right to review its wage structure at any time it chose to do so and to take

whatever action it thought best." [C. T. 30, lines 17-18].

Consideration of the oral and documentary evidence reveals that the wage increase was (1) granted for economic reasons, (2) given in accordance with long-established practice, in the same manner as usual, and (3) decided upon well prior to the advent of any significant union activity.

The Board accepted the testimony of Howland, Fink and Weitzel that the subject of the wage survey came up first in December 1964 when Howland reported that certain competitors were paying higher wages than Petitioner in various job classifications. At the time the survey was initiated there was concededly no evidence that the union was interested in or intended to try to organize Petitioner's employees. Since it was company practice to remain even or above its competition, Weitzel compiled and transmitted to Fink documentary wage data in mid-February, 1965 [R. T. 840-841; R. Ex. 18]. This exhibit confirms that the company rate was low in significant areas [R. T. 841-843]. Fink immediately decided to, and did, increase the top rate for job classifications and then advised Howland to recommend individual increases [R. T. 843-844; 897-898].

As the Trial Examiner states, "within a few days, according to Fink, in consultation with Superintendent Howland, a number of wage increases were decided upon" [C. T. 24, lines 52-54]. There was still no notice of significant union activity even *after* the survey had been completed nor at the time the new top rate classifications were decided upon and individual increases determined.

The Examiner's subsequent statement that, "Before the increases were announced *or even finally decided upon*" a February 28 area-wide union meeting (at-

tended by *some* of Petitioner's employees) was held [C. T. 24, lines 57-60], finds absolutely no evidentiary support and directly contradicts his preceding finding that the wage increases were decided within a "few days" of mid-February—well before the union meeting.

It is true that at the time the increases were actually handed out, March 8, 1965, there was knowledge of some Union activity at the plant, but certainly no awareness of its *extent*. Indeed, at that time there was no indication that more than a very few had any interest in the Union. Combine with this the conceded absence of any union demand for recognition or petition for an election and it is obvious that the Board's 8(a)(1) finding is the product of the prejudicial and mistaken application of hindsight.

The economic reasons proffered by Petitioner for the increase were fully supported by the wage survey [R. Empl. Ex. 18] and never contested by the General Counsel. The Board has substituted for this concrete evidence of lawful motivation mere inference—that the increase *must* have been illegally motivated because of its proximity to the union's demand. But surmise will not, and cannot, support an unfair labor practice finding.

The evidence shows that the motivating factor for the wage raise was completely extraneous to any organizing activity, and the manner in which the wage increase was initiated and decided upon was in complete accord with Company prior and subsequent policy and practice [R. T. 938-942; R. Empl. Ex. 10]. In this regard Howland testified that top rate increases had always been the result of a survey, similar to the one conducted in February 1965 [R. T. 1145-1148]. He further stated that the number of merit increases will vary from year to year, but that the approximately 45 to 50 increases in 1965 were well within the normal

range. Previously the company had given as many as 80 merit increases at one time and there was even an instance where ". . . along with the top rate increases . . . approximately everybody got a merit increase at that time." [R. T. 1148-1149; 1151]. Thus, Petitioner was doing what it had done in previous years in order to remain competitive [R. T. 1298-1308]. Indeed its failure to do so could well have resulted in an unfair labor practice finding on the theory that the increase was withheld on account of union activity.

The Board has itself recognized that the mere coincidence in time between a wage increase and union activity is insufficient to support an inference of illegal purpose. In *Werthan Bag Corp.,* 167 NLRB No. 3 (1967) the Board said:

> "During the organizational campaign, the employer posted a notice that there would be a wage increase. Following the notice, the employer notified each employee of his new rate. The employer did not violate the Act by the granting of the wage increase, since the employer's first assurances of a wage increase preceded the outbreak of any union activity among the employees. *Also, prior to the union campaign, a wage increase was under consideration within the employer's industry in view of government guidelines for a wage increase. Finally, at the time of the increase, other employers within the industry had recently granted increase.*" (Emphasis supplied).

The circumstances which dictated the Board's decision in the above-cited case are the same as those present here. Surely the Petitioner was entitled to follow its practice of matching competitive wages, especially where its initial decision to do so was reached *prior* to employer knowledge of any union activity and its final decision was made when only minimal activity was

known to it. The fact that the union subsequently demanded recognition and petitioned for an election should not be retroactively applied to stigmatize Petitioner's motivation for the increase.

B. Alleged 8(a)(2) Violation—The Grievance Committee.

The Trial Examiner also found, and the Board agreed, that Petitioner dominated and interfered with the formation and administration of a grievance committee in violation of Section 8(a)(2) [C. T. 39, lines 10-13]. An examination of the facts reveals that on March 9, 1965, when President Weitzel suggested that employees select representatives and meet periodically with management to air any problems, the company firmly believed, and had every reason to believe, that the vast majority of employees did *not* want a union to represent them. The reasons for this belief are set forth in detail in Part I.

The Petitioner simply recognized that certain problems might exist—as they do in every company—and attempted to revive a mechanism for resolving those problems and opening lines of communication between management and the rank and file. This was not a new idea dreamed up, as the Board infers, to dilute union interest, which to Petitioner's knowledge was minimal. On the contrary, it is undisputed that a similar type committee had functioned in the past and that Petitioner continually had a Safety Committee which met regularly to discuss problems of safe working conditions and the like [R. T. 819, lines 7-11]. The grievance committee continued to meet periodically during the subsequent union organizational drive and discuss fringe benefit items and working conditions. The company gave consideration to each subject but was explicit in advising employees that it could not, and would not, make

any promises during the pendency of labor board proceedings [C. T. 26, lines 24-57].

Again here the Board's finding of violation rests entirely on the closeness in time between the activation of the committee and the *subsequent* union election drive. Following this rationale an employer must, after learning of *some* union activity, wait indefinitely to institute any such action for fear that it will be rendered unlawful if the union *later* obtains a sufficient showing of interest (30% under Board rule) to petition for an election, *a circumstance wholly outside the employer's control.* Such a theory, without more, does not sustain a Section 8(a)(2) finding. Certainly, at any rate, if a violation should be found, it is more technical than coercive and borders closely on *de minimis.*

C. Alleged Unlawful Discharges—Section 8(a)(3).

The Board agreed with and attempted to bolster its Trial Examiner's conclusion that Petitioner's discharge of two employees, Alfred Cantrell and Irving Klein, was discriminatorily motivated [R. T. 67-68; 33-37].

Before discussion of these terminations, a preliminary observation should be made. Even if this Court upholds the Board's findings of Section 8(a)(3) violations, such decision will have no effect on Petitioner's contention that it entertained a good faith doubt of the Union's majority status. This is because good faith doubt, or lack of it, is pertinent only to a Section 8(a)(5) refusal to bargain charge and is determined as of the date of a union's demand for recognition, a proposition the Trial Examiner implicitly confirms by basing his finding of lack of doubt solely on the alleged 8(a)(1) and (2) violations covered above[28] [C. T. 30].

[28]Note, too, Klein's termination occurred June 25, exactly two weeks *after the election* [C. T. 34, lines 39-40].

In the case of both Cantrell and Klein, Petitioner supplied overwhelming evidence of economic justification for their discharge. Cantrell performed as a night milling machine and drill press operator during all the period of his employment. His supervisors, Walter Payton and Howland, both testified without contradiction that the "mix" of the work performed by Petitioner was progessively changing to aerospace and away from tool and die, resulting in considerably less need for tool makers in comparison to earlier years [R. T. 1025-1026; 1646-1651; 1107].

A consequent reduction in milling machine work led directly to Cantrell's layoff. At the time Cantrell was the only milling machine operator on the night shift and his hours had just been reduced [R. T. 1098-1100]. Since Cantrell's layoff, no one has ever been hired to replace him and whatever little milling machine work needs to be done is performed on the day shift [R. T. 1697; 1108].

Cantrell had not only never performed any work on the jig bore machine, a position open on the date of his termination [R. T. 1044], but had twice turned down a job as jig bore trainee [R. T. 1101-1102, 1640-1641; 1693]. One such refusal was accompanied by his emphatic undenied statement,

> "*No, I do not want to go with the jig bore room. I am not a jig bore man, and I do not want to become one.*" [R. T. 1693] (Emphasis supplied).

The Board stressed that Cantrell was a known union adherent as a basis for its conclusion [C. T. 67]. But the same can be said for a number of other employees who had loudly vocalized their pro-union feelings, and were *not* terminated.

It further questioned as "unreasonable" that an employee who had been working a 54-hour week, including 10 and 8 hours in his last two days would "abruptly become unneeded." [C. T. 68]. This contention loses all force when it is seen that the company also laid off another employee, Victor J. Stone, for the same reason—lack of work, when Stone, like Cantrell, had worked 10 and 8 hours on the two days prior to his layoff [R. T. 1100-1101; R. Empl. Ex. 13].

Finally, the Board expressed surprise that Cantrell was not reoffered a position as a jig bore machinist since Petitioner was in need of one as evidenced by contemporaneous newspaper advertisements [C. T. 68]. Reliance on this rationale could not be more misplaced. True, at the time Cantrell was laid off there was an opening for an *experienced* jig bore operator. The Petitioner did, in fact, hire an experienced man in May of 1965 [R. T. 1105-1106]. But no one in management suspected that Cantrell had any experience on jig bores. Cantrell never relayed such information to Howland, either when Howland offered him the job of trainee, or on his termination. Nor did there appear on Cantrell's application for employment anything to indicate such experience [R. T. 1044-1045; R. Empl. Ex. 11].

Finally, giving weight to Petitioner's "failure to at least inquire of Cantrell if he would fill the jig bore vacancy at the time of his discharge" [C. T. 68], not only ignores the undenied fact that Cantrell could not have performed that job without two years' prior training [R. T. 1042; 1355; 1371] but, moreover, indulges in the most strained of inferences. In the realm of speculation, it is just as probable, if not more so, that Petitioner's failure to offer him the posi-

tion, assuming now that Cantrell was qualified to take it, was because he had already refused a similar job offer of trainee twice before in emphatic terms.

The findings regarding Irving Klein, a toolmaker, are based on equally rank speculation. Klein was terminated on June 25, 1965, two weeks *after* the election, which Petitioner had *won* 59-40. That the election had been concluded and in Petitioner's favor would seem to remove most reason for a discharge on account of Union activity. The Trial Examiner found no difficulty in conjuring up such a "reason,"

> "Objections to the election were filed on June 17. The [Petitioner] had counsel and must quickly have learned that if the objections were sustained another election might be held. . . . The Petitioner] had reason to believe that if the election were to be set aside Klein would again be among those urging the employees to vote for the Union." [R. T. 37, lines 20-28].

This theory compounds numerous separate assumptions having no record support: that counsel had advised Petitioner concerning objection procedure prior to June 25; that Petitioner felt there was a strong chance the objections would be sustained; that when this occurred, a new election would be ordered; and that Klein would not have quit and would be a Union advocate in a second election that may have taken place *years* later.

And this conclusion was adopted despite substantial, uncontroverted evidence that Klein's discharge was because of his failure to perform his work on time which resulted in a consistent loss on projects assigned to him. In what can only be viewed as a substitution of

his own "business judgment" for that of the businessman's, the Trial Examiner declared:

> "I am quite unconvinced that the [Petitioner] used the profit and loss calculations to appraise the competency or performance of the toolmakers." [C. T. 37, lines 1-2].

and concluded that Klein was discharged to discourage Union activity [C. T. 37, lines 34-36]. An impartial judgment of all the evidence shows that the only reasonable, logical conclusion is that Klein was justifiably terminated exactly for the reason given, namely, that of consistently failing to efficiently perform his work.

Assuming knowledge on Petitioner's part of Klein's union activity,[29] the discharge was nevertheless in keeping with company policy of terminating toolmakers who show a constant loss [R. T. 1339, lines 10-25]. Profit or loss on toolmaking jobs is determined based upon a job estimate [R. T. 1263] and depends on the toolmaker's ability to properly plan for the production of each job assigned. Thus, planning is his basic responsibility [R. T. 1041-1042; 188, lines 19-25; 119]; 1304-1305]. As a means of evaluating the

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[29]There is no showing that Petitioner was ever aware of any activities by Klein in support of the Union. The Board points to conversation between Klein and Howland in which the latter had stated that all employees campaigning in the company for the Union were, in his opinion, organizers. He had preceded this with the statement to Klein, "Irving, you don't look like a paid organizer to me." [C. T. 67, n. 1].

It is impossible to discern from this colloquy whether Howland was jesting, whether he was or was not accusing Klein of Union partisanship, or whether he really thought Klein was pro-union. Contrast this with Klein's own testimony that he was never questioned concerning his Union activities and that no supervisors was ever present when he engaged in such activities [R. T. 309, lines 7-25; 312, lines 14-25]. Petitioner's lack of knowledge of Union activity on the part of Klein requires a reversal of the Board on that point alone.

performance of the toolmakers, Howland keeps a profit and loss statement for each man. One was kept for Irving Klein [R. T. 1191-1196; R. Empl. Ex. 16]. It shows, that by December of 1964 the majority of his jobs were losses. Although some improvement occurred in March and Klein shared in the March 8 wage increase [R. T. 1265], between March and mid-June 1965, Klein's record of profit and loss showed a marked deterioration. As the Trial Examiner concedes, "Klein's profit and loss statement thereafter shows an almost unbroken string of losses ranging from $179 to $839." [C. T. 36, lines 54-55; R. Empl. Ex. 18].

Howland evaluated Klein's performance and in considering a termination said this:

> "I took his entire picture into consideration, figuring his volume, his potential, how he could get the job out under our system and from all of his data, I decided he couldn't function in our system." [R. T. 1266, lines 3-6].

Accordingly, Howland terminated Klein because, as his discharge notice [R. Empl. Ex. 17] stated, Klein "failed to perform work in the time allowed."

The overwhelming evidence is that such calculations were and are used for the purposes stated by Petitioner. When applied to Klein, the same as all other toolmakers, they resulted in his discharge. The Trial Examiner remained "unconvinced" principally because he did not believe the profit and loss statements fairly measured performance [C. T. 36, lines 13-43]. It is not his duty to pass judgment on the business wisdom of Petitioner, but rather to decide whether the statements were utilized as indicated. The uncontradicted evidence is that they were. The mandate of *NLRB v. Universal Camera Corp.*, 340 U.S. 474 (1951), that the

Board's finding be supported by substantial *evidence,* has been contravened.

The burden of proof was on the General Counsel to prove that some part of the company's motivation was discriminatory. *NLRB v. Swan Super Cleaners, Inc.,* 384 F. 2d 609 (6th Cir., 1967). This he failed to do. It is not enough merely to show that the Petitioner knew Cantrell and Klein were Union activists, assuming even that has been demonstrated, for such knowledge does not insulate them from discharge for a nondiscriminatory, good cause. *Lawson Milk Co. v. NLRB,* 317 F. 2d 756, 760 (6th Cir., 1963); *Crawford Mfg. Co. v. NLRB,* 386 F. 2d 367 (4th Cir., 1967). Discriminatory motive cannot reside entirely, as here, in a Board view that the discharges, in its opinion and absent any objective evidence to support it, were without sufficient cause. *NLRB v. Houston Chronicle Pub. Co.,* 211 F. 2d 848, 854 (5th Cir., 1954); *NLRB v. Wagner Iron Works,* 220 F. 2d 126, 133 (7th Cir., 1955) *NLRB v. Swan Super Cleaners, Inc., supra.* For these reasons, the Board's unfair labor practice findings under Section 8(a)(3) lack the necessary substantial evidentiary support and enforcement thereof should be denied.

Conclusion.

For each of the foregoing reasons the Decision and Order of the Respondent should be set aside in each and every particular.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

STANLEY E. TOBIN

APPENDIX A.

IN UNION THERE IS STRENGTH

R.-6

UAW FACT FINDER

TOOL & DIE SHOPS
OF SOUTHERN CALIFORNIA

In the statements below, please select one of the three answers which you believe is correct.

1. In order for the U.A.W. to petition the United States Government to conduct a secret ballot representation election at your Company, the law requires the U.A.W. to submit Authorization cards from at least---

   A. 30% of the plant employees ☐
   B. 50% of the plant employees ☐
   C. 60% of the plant employees ☐

2. The most effective way to obtain signed U.A.W. Authorization Cards from employees in my plant is ---

   A. To attach an Authorization Card to every handbill that is distributed. ☐
   B. To organize an effective in-plant Volunteer Organizing Committee within the plant, with several V.O.'s in each dept. ☐
   C. To mail Authorization Cards to the homes of employees. ☐

3. When a tool and die worker signs a U.A.W. Authorization Card, it means that---

   A. He will definitely vote "YES" for the U.A.W. on Election Day. ☐
   B. If the employee knows very little about the U.A.W., its contracts and achievements, he may still be swayed by last minute Company letters and captive audience meetings, to vote for the Company. ☐
   C. He is just trying to get the Volunteer Organizer off his back. ☐

4. Statistics prove, that where a Union petitions the United States Government to conduct an election at a plant, the majority of plants voted for the Union when the plant had between---

   A. 30% to 40% of the employees signed up on Authorization Cards. ☐
   B. 50% to 60% of the employees signed up on Authorization Cards. ☐
   C. 70% to 100% of the employees signed up on Authorization Cards. ☐

5. All tool and die workers should be encouraged to attend U.A.W. Organization meetings because---

   A. It gives an employee a chance to get a night "out with the boys." ☐
   B. It affords an employee an opportunity to listen to both sides before forming an opinion for or against the U.A.W. ☐
   C. It provides an opportunity for tool and die workers to learn the ways of self-organization, so their wages can be improved, their fringe benefits broadened and their standard of living

In the questions listed below, select the answer which your group believes is correct:

1. AFTER WE HAVE PETITIONED THE U.S. GOVERNMENT FOR A SECRET BALLOT REPRESENTATION ELECTION AT OUR PLANT

   (a) The Volunteer Organizing Committee can sit back and relax knowing that the election is in the bag. ☐

   (b) We can discontinue holding our plant-wide and V.O. meetings. ☐

   (c) We must intensify our V.O. and plant-wide meetings and we must strive to have as great an attendance as possible. ☐

2. AFTER WE HAVE PETITIONED THE U.S. GOVERNMENT FOR A SECRET BALLOT REPRESENTATION ELECTION AT OUR PLANT

   (a) We can reasonably expect our Company to sit idly by and not do a thing to influence our vote on election day. ☐

   (b) We can reasonably expect that the outside labor consultant will encourage a "yes" vote for the union on election day. ☐

   (c) We can reasonably expect the outside labor consultant and top management officials to begin an intensified campaign using captive audience meetings, pre-packaged letters to our homes and other forms of paternalistic solicitation on their part. ☐

3. A NUMBER OF WEEKS WILL PASS BETWEEN THE TIME WE PETITION FOR OUR ELECTION AND THE TIME WE HAVE OUR ELECTION. THIS IS DUE TO GOVERNMENT PROCEDURES AND OFTEN TIMES DUE TO THE FACT THAT A COMPANY WILL REFUSE TO CONSENT TO AN ELECTION. DURING THIS PERIOD OF TIME, WE SHOULD

   (a) Continue to solicit the support of non-card signers in our plant by explaining the union program to them and by informing them of anticipated company activities whereby the company will try to divide the employees. ☐

   (b) Ignore and bypass the non-card signers because we are confident that we can win the election without their support. ☐

   (c) Involve ourselves in arguments and name calling with those employees who are strongly pro-company. ☐

4. DURING THIS PERIOD OF TIME, WHILE WE ARE AWAITING OUR ELECTION DATE, WE WOULD PLAN TO SOLIDIFY OUR UNION GROUP BY

   (a) Planning now to encourage as many people as possible to attend our Union meetings. ☐

   (b) Establishing a well organized and methodical program for making house-calls on specific people at their homes. ☐

   (c) Constantly striving to improve our communication system in the plant, so that everyone will be aware of all of the issues in our campaign. ☐

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APPENDIX B.

Transcript References Depicting General Employer-Employee Communication Practices as They Pertain to the Good Faith Question.

Addison [R. T. 856-857; 1339-1340; 1489-1490; 1546-1548]; Ahlstrom [R. T. 1164]; Ampthor [R. T. 651-664; 784-785; 1237]; Berno [R. T. 1757; 1760-1772]; Bertram [R. T. 1619]; Booze [R. T. 1335; 1430-1431; 1556-1557]; Bradley [R. T. 1163; 1496-1498; 1620-1621]; Burke [R. T. 1658-1659]; Burns [R. T. 1524-1525. 1593]; Cantrell [R. T. 911-912]; Cheetham [R. T. 777; 1410-1411; 1416; 1594-1595]; Christenson [R. T. 1459; 1664]; Christopher [R. T. 1689-1690]; Cisneros [R. T. 586; 1668-1669; 1705-1706]; Clendenin [R. T. 856-861; 1528-1529; 1540-1541; 1669-1671]; Congrove [R. T. 1671]; A. Crandall [R. T. 1672-1673]; D. Crandall [R. T. 1162]; Cuda [R. T. 861-862]; Dale [R. T. 1512-1516]; Dellomes [R. T. 1361-1362; 1368-1370]; Dodd [R. T. 1674]; Doebler [R. T. 1567-1568]; Estrada [R. T. 1381; 1675-1676]; Fehland [R. T. 1395-1399; 1529-1530; 1568-1569]; Freeze [R. T. 1676-1678; 1706]; Gardner [R. T. 1598-1599]; Garger [R. T. 1519]; Garrett [R. T. 1333]; Gowen [R. T. 1171; 1337]; Grive [R. T. 861-865; 1622]; Hibbard [R. T. 1172]; Hirschmann [R. T. 1569-1570]; Hoef [R. T. 1570-1571]; Hunt [R. T. 1477; 1680]; Johnson [R. T. 1608]; Kastendick [R. T. 1238; 155; 1571; 1608]; Kevelighan [R. T. 1320-1321; 1705-1706]; Kimura [R. T. 1439-1440; 1571-1572]; I. Klein [R. T. 1608]; Knoles [R. T. 411-414; 778; 867-868; 1331]; Kocsis [R. T. 1163; 1574-1575]; Kofink [R. T. 507-511; 780; 1575]; Kruse [R. T. 1171]; Kuhmann [R. T. 786; 1683]; Lamb [R. T. 1608; 1622-

1623]; Lary [R. T. 788; 1171]; Lawrence [R. T. 1163-1164; 1324-1325; 1482; 1600; 1613-1614]; Letts [R. T. 1530-1531; 1542]; Mancini [R. T. 1486-1487; 1683-1684]; Mansfield [R. T. 623; 1685]; Mellone [R. T. 1331]; Meier [R. T. 751]; Moran [R. T. 1167; 1326]; Morris [R. T. 879-880; 1578]; Myer [R. T. 1686-1687]; Nowak [R. T. 1556-1557]; Pashone [R. T. 1509-1510; 1622-1626]; Poirier [R. T. 1532-1533]; Polony [R. T. 779; 1375-1377; 1601]; Proudfoot [R. T. 480-489; 1332; 1534-1535]; Rawl [R. T. 1687-1688]; Rhedin [R. T. 1451; 1454; 1552-1553]; Riegler [R. T. 1389-1390; 1393-1395; 1562-1564]; Scovel [R. T. 1494; 1688-1689]; Schlapp [R. T. 1579-1580]; Senyk [R. T. 1402-1403; 1580-1581]; Seymour [R. T. 1443; 1772-1773]; Smith [R. T. 1324; 1602-1603]; Stowe [R. T. 925]; Teiman [R. T. 1333]; Thomas [R. T. 1337]; Voegeli [R. T. 1321-1322; 1553-1554; 1605-1606]; Vogl [R. T. 557-558; 781; 1335]; Welsh [R. T. 1332]; Rbt. Weymar [R. T. 522]; Rolf Weymar [R. T. 1332-1333]; Whiteman [R. T. 1322-1323; 1435-1436]; Williams [R. T. 1554-1555]; Wilson [R. T. 1322; 1555]; Wright [R. T. 874; 1239]; Zadnik [R. T. 1166].

APPENDIX C.

Evidence Which Employer Considered in Formulating Its Decisions on Each and Every Employee's Union Sentiment—The Major Basis for Petitioner's Good Faith Doubt.

1. *Addison:*

Plant Manager Howland put Addison down as being against the Union on Respondent's Exhibit #7. Fink and Howland both testified that on the evening of March 15th, Howland had stated to Fink he had had a conversation with Addison who indicated to him that he was against the Union, that Addison had mentioned something about a friend who had owned a shop which had a union and based upon what Addison had heard from his friend, he did not believe Respondent* should have a union. Howland further testified that Lawler, a supervisor, had told Howland that he, Lawler, had a conversation with Addison wherein Addison had clearly expressed himself as being against the Union [R. T. 856, line 22, to R. T. 857, line 4; R. T. 1329, line 25, to R. T. 1330, line 3].

Addison himself testified that he had refused to sign an authorization card and that at the end of February or early March of 1965, in a conversation he had had with Lawler, he told the latter he wasn't in favor of the Union in the shop; in fact, testified Addison, he made his position known to everybody from the beginning of the Union activity [R. T. 1489, line 18, to R. T. 1491, line 19]. Lawler testified that he had had a conversation with Addison at the end of February, as well as a number of conversations prior to that time, con-

*References to "Respondent" in this Appendix are to the employer.

cerning the Union and that Addison told Lawler he was upset about the Union activity, discussed his friend's difficulty with the Union, and said he did not want to see the Union in Respondent's plant. That same evening, at the end of February, Lawler told Howland what Addison had said to him about the Union [R. T. 1546, line 20, to R. T. 1548, line 9].

2. *Ahlstrom:*

Howland put this employee down on Respondent's Exhibit #7 as being for the Union. Fink confirmed it by a notation. On the evening of March 15th, Howland had told Fink that Ahlstrom had indicated to Howland that Ahlstrom was strongly for the Union [R. T. 1164, lines 16-19].

3. *Amthor:*

This employee's name was not on Respondent's Exhibit #7 because he was not a skilled worker. However, both Howland and Fink felt that he would be able to vote because he was a carpenter and did crating in the plant [R. T. 784, line 25, to R. T. 785, line 7]. Howland told Fink at the meeting of March 15th that Amthor had told Howland he was against the Union; Howland also testified that in early March, Amthor had told him that Ahlstrom was continually coming out to the carpenter's shop asking Amthor to sign a card and that Amthor finally signed the card in order to get Ahlstrom off his back [R. T. 784, line 25, to R. T. 785, line 7; R. T. 1237, lines 14-25].

Amthor, himself, fully supported Howland's and Fink's testimony that he was against the Union; he stated that he had a conversation a few days after he signed the authorization card in which he voluntarily

told Howland he did not want any part of the Union [R. T. 651, line 14, to R. T. 654, line 1].

4. *Anothaiwongs:*

This employee, who at the time of the hearing was in Thailand [R. T. 1739, lines 14-18], told Howland that because he was leaving the country he did not know if the Union could do him any good. Based upon Anothaiwongs' own statements of indecision regarding the Union to Howland, Howland, on Respondent's Exhibit #7, marked Anothaiwongs as being undecided [R. T. 1331, line 23, to R. T. 1332, line 2]. It would appear that Anothaiwongs' lack of sympathy for the Union cause was also confirmed to Howland by a conversation that Isak had with Anothaiwongs which Isak related to Howland. In the latter part of February, Isak advised Anothaiwongs not to go all over the plant during working hours but to stick to his work. Anothaiwongs replied, "Most of the guys do bother me to sign the card and want to influence me for the Union. I really don't care for them. I just want to keep them off my back because they are sometimes very nasty." [R. T. 1564, line 15, to R. T. 1565, line 17]. Thus, with the evidence that Howland had at the time of his preparing Respondent's Exhibit #7, at the very least it would reasonably appear to him that Anothaiwongs was "at best" against the Union, and "at worst," undecided.

5. *Berno:*

While Berno (as other employees who are referred to as indirect personnel, though stipulated to as being part of the unit) was not listed on Respondent's Exhibit #7, and though what Fink and Howland dis-

cussed about Berno on the evening of March 15th was not recalled [R. T. 901, lines 23-25; R. T. 1170, line 20], Berno's attitude toward the Union, as expressed to Fink and Howland prior to this time, made it quite clear to both of them that Berno was undoubtedly against the Union.

6. *Bertram:*

Howland put Bertram down as being for the Union, and this was based upon both the fact that he had to reprimand Grice, who was against the Union, for his physically threatening Bertram and also because Zeman, another supervisor, had reported to Howland that Bertram indicated he was probably for the Union. [R. T. 1334, lines 16-19; R. T. 1619, line 11, to R. T. 1620, line 15].

7. *Boone:*

Boone, another indirect employee who was not listed on Respondent's Exhibit #7, was also discussed between Fink and Howland that evening. He was put down as "undecided" though the reason is not given. [R. T. 785, lines 18-20; R. T. 1171, line 21]. In point of fact, he did not sign an authorization card.

8. *Booze:*

Howland put down on Respondent's Exhibit #7 that Booze was against the Union. This was based upon the fact that Booze, at his bench, had previously told Howland that he didn't see where the Union could do him any good, that the Union hadn't done him any good in the past. Further, Isak testified that in the early part of March he told Howland in his office that Booze was against the Union. Isak based this in-

formation upon the fact that Fred Nowak, who works close to Booze, had told Isak that Booze, himself, had said he had no use for the Union. [R. T. 1335, lines 16-20; R. T. 1565, line 18, to R. T. 1566, line 22; R. T. 1567, lines 5-19].

Booze, himself, testified that he had told Howland around the first of March he had attended a Union meeting but did not think the Union could do him any good [R. T. 1330, line 8, to R. T. 1331, line 2]. Based upon this evidence, Howland had no doubt that Booze was against the Union.

9. *Bradley:*

Bradley was listed by Howland on Respondent's Exhibit #7 as undecided. The evidence shows that Howland himself never had any direct conversations with Bradley that were concrete enough so as to leave no doubt in Howland's mind that Bradley was against the Union. These conversations, however, did indicate to Howland that Bradley was uncertain. [R. T. 1163, lines 9-14]. Zeman, however, testified that Bradley told him in the latter part of February at his bench that he had received a phone call about a Union meeting and inquired of Zeman what was going on. Zeman told him about the Union organizational efforts, and Bradley stated he was against the Union. Later that day, Bradley stated to Zeman that not only was he against the Union, but that another employee, Scoggins, was also against the Union. At the end of February, Zeman related these conversations he had had with Bradley to Howland [R. T. 1620, line 16, to R. T. 1621, line 18].

Bradley, himself, testified and fully supported Zeman's testimony; he related that he inquired of

Zeman about the Union activity and told Zeman at that time he was against the Union and later the same day told him that Scoggins was also against the Union, and that he did this voluntarily [R. T. 1497, line 3, to R. T. 1498, line 9]. It is quite clear, therefore, that Bradley made his anti-union views known to Respondent's officials and that Howland's listing him as being undecided was, if anything, an expression of extreme caution on the part of Howland.

10. *Burke:*

Howland listed Burke on Respondent's Exhibit #7 as being for the Union. He told Fink on the evening of March 15 that Burke himself had told him that he was for the Union. Burke also told Payton the same thing at the end of February, and Payton had related this conversation to Howland [R. T. 1162, line 23, to R. T. 1163, line 2; R. T. 1662, line 21, to R. T. 1663, line 9].

11. *Burns:*

This employee was listed on Respondent's Exhibit #7 as being against the Union and on March 15 Howland told Fink that Burns himself had expressed to Howland several times his opinions against the Union and that Burns was a staunch conservative [R. T. 1166, lines 4-7]. The evidence also shows that Burns advised Woods, his supervisor, of Union activity around February 22nd and that in a later conversation, Burns stated emphatically that he was against the Union. Woods, in turn, told Howland of his conversations with Burns [R. T. 1524, line 20, to R. T. 1525, line 19; R. T. 1527, line 4, to R. T. 1528, line 6; R. T. 1539, lines 2-6].

Negrete, another supervisor, also testified that Burns told him in the early part of March that he, Burns, wanted no part of the Union and he didn't believe in Unions [R. T. 1593, lines 9-23]. At the time of the hearing Burns was in Ohio [R. T. 1739, lines 20-21].

12. *Cantrell:*

This machinist employee was put down by Howland on Respondent's Exhibit #7 as being for the Union. Fink entered an additional asterisk before his name on that document because he had just had a conversation a couple of days before and Cantrell indicated he had been a Union member [R. T. 783, lines 15-20]. While in his conversation with Cantrell on March 12, Cantrell told Fink that he did not think Mechanical Specialties needed a Union, based upon his statement that he was a Union member, Fink agreed with Howland. Howland had informed Fink that Payton had said that Cantrell was for the Union [R. T. 911, line 22, to R. T. 913, line 20; R. T. 1168, lines 19-20]. Payton testified that he told Howland of Cantrell's statements that he, Cantrell, was in favor of the Union [R. T. 1668, lines 11-16].

13. *Chavez:*

Chavez was one of the indirect personnel who was not listed on Respondent's Exhibit #7 but was discussed on the evening of March 15 [R. T. 1170, line 22]. Based upon the conversations that both Fink and Howland had with Chavez and Chavez' assertions of ultra-conservative views, both Fink and Howland considered him to be against the Union [R. T. 787, lines 17-19].

14. *Cheetham:*

Howland listed Cheetham as being against the Union on Respondent's Exhibit #7. Howland testified that Negrete, Cheetham's supervisor, had told him, Howland, of conversations with Cheetham regarding the Union and both Fink and Howland recalled that Cheetham had had experiences in England and Canada with the Unions and that Cheetham indicated he did not want a Union in Respondent's plant [R. T. 857, lines 9-17; R. T. 1330, lines 8-17]. Previously, Cheetham had asked Fink if it was all right if he could attend the Union meeting and Fink had told him that it would be wise for Cheetham to see what the Union had to offer. In that conversation, Cheetham had indicated to Fink that he was undecided, which caused Fink to put the question mark notation beside Cheetham's name [R. T. 777, lines 3-9].

Cheetham himself fully supported both Fink and Howland's testimony and testified that some time at the end of February or the beginning of March he had had conversations with Negrete in which he indicated he felt the conditions at Respondent's plant were very favorable and that he did not think the Union could improve conditions [R. T. 1410-1417]. Negrete, for his part, testified that Cheetham had called him over to his machine one day and asked questions about the Union. The following day, Cheetham told Negrete he had been to a meeting and was against the Union because it offered him nothing. Negrete told Howland about his conversation with Cheetham around the first of March [R. T. 1594, line 10, to R. T. 1595, line 20; R. T. 1607, lines 8-14].

15. *Christenson:*

At the hearing, this former employee testified that at the time the authorization cards were being distributed in February and the beginning of March, he told Payton that he was against the Union, and also told him that Cantrell threatened to sign a card for Christenson [R. T. 1459, lines 10-20]. Payton testified that in the latter part of February, Christenson told him he was against the Union; that he had belonged to a Union in another plant and did not feel he had gotten a fair deal and did not want a Union in this plant [R. T. 1663, line 10, to R. T. 1664, line 1]. Payton further testified that he had told Howland about his conversations with Christenson. Subsequently, in March, according to the testimony of Payton, Christenson told him that he had signed a card to bring about an election but was against the Union. Payton related this conversation to Howland the following day [R. T. 1665, line 2, to R. T. 1666, line 1].

Though Howland listed Christenson as being undecided on Respondent's Exhibit #7, and based this, according to his testimony, on Payton telling him that Christenson was undecided [R. T. 1169, lines 17-18], since both Christenson and Payton testified that Christenson had stated he was against the Union, it would appear that Howland listed Christenson as undecided as a result of confusion in Howland's mind, because, in fact, Christenson was clearly and continually against the Union.

16. *Cisneros:*

This employee was listed on Respondent's Exhibit #7 as undecided. He testified that he told Payton, his supervisor, that he was undecided. Payton stated that

the first or second day of March 1965, he had a conversation with Cisneros who had asked him many questions, and had indicated to Payton he was undecided. Payton, at the end of the conversation advised him to speak to a fellow employee, Kebelighan, for further guidance regarding Union organization [R. T. 586, lines 18-22; R. T. 1668, line 20, to R. T. 1669, line 24; R. T. 1705, line 12, to R. T. 1706, line 9]. Payton related his conversation with Cisneros to Howland the following day. [R. T. 1335, lines 7-11; R. T. 1669, lines 20-24]. It is clear that Cisneros had prior to March 15 made known to management officials that he was undecided regarding the Union.

17. *Clendenin:*

Fink testified that he concurred with Howland, as indicated on Respondent's Exhibit #7, that Clendenin was against the Union. Fink had spoken to Clendinin several times regarding the Union, beginning around the first of March, in the Inspection Department. Clendenin had told Fink that he did not want the Union [R. T. 777, line 19, to Tr. 778, line 4; R. T. 859, line 14, to R. T. 861, line 8].

Woods testified that he had a conversation with Clendenin at the end of February; that he usually spoke to Clendenin every evening, and that Clendenin had mentioned the subject of Union activities and told Woods that he was against a union in the plant. The following day, Woods related this conversation to Howland [R. T. 1528, line 10, to R. T. 1529, line 7; R. T. 1539, line 16, to R. T. 1541, line 3].

Payton testified that at the end of February, Clendenin came to him and stated that if the Union got

in, he, Clendenin, would probably quit; he told Payton quite clearly that he did not want a Union at Mechanical Specialties. Payton related this conversation to Howland the following day [R. T. 1669, line 25, to R. T. 1671, line 2].

18. *Congrove:*

This employee was listed on Respondent's Exhibit #7 as being for the Union. Howland related to Fink the fact that Payton had told Howland that Congrove was for the Union and Payton in his testimony supported this conclusion [R. T. 1167; R. T. 1671, lines 10-22].

19. *Connor:*

In Respondent's Exhibit #7, Connor is listed as being for the Union. Negrete had had a conversation with Connor regarding the Union wherein Connor had stated he was not in favor of the Union though he had been a Union man back East. Connor, according to the testimony of Negrete, stated at the time that if he had anything to say to management, he would go right to the top. Negrete told this to Howland [R. T. 1596, line 16, to R. T. 1597, line 3; R. T. 1607, lines 15-20]. Howland, however, testified that he had had a talk with Connor at his machine and Connor had indicated that he was unhappy with the way things were going on in the plant. Because of Connor's statements to Howland, Howland disregarded the information supplied to him by Negrete and put Connor down as being for the Union [R. T. 1318, line 18, to R. T. 1319, line 5].

20. *A. Crandall:*

A. Crandall was listed by Howland on Respondent's Exhibit #7 as being undecided. Howland stated that Zeman had indicated that Crandall was for the Union but that Payton indicated and had given reasons to Howland that Crandall was undecided.

Payton testified that at the beginning of March, in the production area, Crandall had asked Payton's opinion was had, the great weight of evidence indicates he was against the Union, Crandall said "I haven't made up my mind as to which way I will vote yet." Payton told Howland of this conversation the following day [R. T. 1672, line 8, to R. T. 1673, line 5].

As a rebuttal witness, the General Counsel put Crandall on the stand and he testified that he did have a conversation with Payton and that he did tell Payton he was undecided. Crandall, however, testified that he "guessed" that his talk with Payton was about six weeks after the latter part of February or, in other words, some time around the middle of April [R. T. 1798, line 8, to R. T. 1802, line 16].

In that Payton was quite clear that that conversation with Crandall was at the beginning of March and Crandall was in doubt as to when the conversation took place, and in that Howland had stated that Payton had told him of the conversation prior to March 15, and in that Payton was on sick leave during most of April during the time that Crandall "guessed" the conversation was had, the great weight of ecvidence indicates that at the beginning of March Crandall told Payton that he was undecided.

21. *D. Crandall:*

D. Crandall, the son of A. Crandall, was listed on Respondent's Exhibit #7 as being for the Union. This employee had told Howland that he thought a Union would better his trade and this is what Howland told Fink at the meeting on March 15th [R. T. 1162, lines 14-20]. Lawler, his supervisor, had expressed the same opinion to Howland at the end of February [R. T. 1548, line 10, to R. T. 1549, line 13].

22. *Cuda:*

Howland listed Cuda as being undecided on Respondent's Exhibit #7. At the meeting of March 15, Fink testified that Howland said that Cuda had said his father's business had had union difficulties. Cuda testified but neither confirmed nor denied having raised this subject to management officials or others [R. T. 861, line 17, to R. T. 862, line 8].

23. *Dale:*

Howland listed this employee on Respondent's Exhibit #7 as being against the Union. Howland stated to Fink on March 15 that Negrete, Dale's leadman, had said that Dale had told him that he, Dale, did not require a third party but could take care of his problems himself [R. T. 1165, line 23, to R. T. 1166, line 1]. Dale testified that he had told Howland he was not for the Union some time around the first of March and that within a couple of weeks of that time he had a talk with Negrete and also told Negrete he was against the Union [R. T. 1513; R. T. 1516]. Negrete, for his part, stated that at the end of February or the beginning of March while riding to work with Dale,

Dale had stated in conversations that he was against the Union and that he could take care of himself. Negrete at that time told Howland of his conversations with Dale [R. T. 1597, line 6, to R. T. 1598, line 5].

24. *Dellomes:*

Dellomes was listed on Respondent's Exhibit #7 as being against the Union. Howland told Fink at their meeting that Payton had told him that Dellomes stated he was against the Union [R. T. 1164, line 24, to R. T. 1165, line 4]. Dellomes, himself, testified that Payton was present at the lunch period break where all employees were gathered when Dellomes had told Cantrell and others he was definitely against the Union and that he had signed a card solely to get an election and get the election over with and that he would quit his job rather than become a member of the Union [R. T. 1357, line 12, to R. T. 1359, line 19]. Dellomes further testified that, at the end of February or the beginning of March, he had several conversations with Payton in which he told him quite clearly he was against the Union [R. T. 1361, line 11, to R. T. 1362, line 8; R. T. 1368, line 19, to R. T. 1370, line 12]. Payton fully corroborated the testimony of Dellomes regarding the conversations and also testified that he told Howland about these conversations the day following each of them [R. T. 1666, line 2, to R. T. 1667, line 23; R. T. 1673, lines 17-25].

25. *Dodd:*

Respondent's Exhibit #7 lists Dodd as being for the Union. Howland testified that Payton had told him that Dodd was definitely for the Union and Payton

testified that Dodd told him at the end of February, "I have belonged to many unions, and I have never belonged to one yet but what I didn't get a screwing but I am going to vote for the Union again." [R. T. 1333, lines 18-19; R. T. 1674, lines 1-16].

26. *D. Doebler:*

Howland listed Dennis Doebler on Respondent's Exhibit #7 as being undecided. He based this on the fact, and so told Fink, that Doebler, an apprentice, had stated that he, Doebler, would make up his own mind in regard to the Union [R. T. 1168, lines 15-18].

Isak testified that he had a talk with Doebler in the latter part of February at the bandsaw and that Doebler said because he was an apprentice, he did not see how the Union could do him any good. On the same day, Isak related this conversation with Doebler to Howland [R. T. 1567, line 20, to R. T. 1568, line 14]. Doebler, at the time of the hearing was in the Army [R. T. 1739; R. T. 1740].

27. *F. Doebler:*

F. Doebler, the father of Dennis, during the period of Union organization, was on sick leave and away from the plant. Naturally, both Fink and Howland presumed that under the circumstances, he had not signed a Union authorization card, or had indicated his Union beliefs. Thus, Howland's notation on Respondent's Exhibit #7 merely indicated that F. Doebler was "sick".

28. *Dominguez:*

There is no direct testimony regarding this employee. He was not listed on Respondent's Exhibit #7 nor did he sign a Union authorization card.

29. *Dufek:*

Respondent's Exhibit #7 lists Dufek as being "undecided." Howland said that he told Fink on March 15 that Payton had stated that he, Payton, did not know where Dufek stood on the Union question. Zadnik, however, had told Howland that he felt that Dufek was against the Union. Howland, therefore, put Dufek down as undecided [R. T. 1168, lines 5-9].

Payton testified that he had no conversations with Dufek and did not know whether he was for or against the Union, though he felt that Dufek might be for the Union, in that many of the Union adherents were constantly coming over to his machine [R. T. 1674, line 22, to R. T. 1675, line 6; R. T. 1713, line 23, to R. T. 1714, line 15].

30. *Estrada:*

Respondent's Exhibit #7 lists Estrada as being against the Union, with the further notation, "weak." Howland, on March 15, told Fink that Berno had told him that at the Union meeting the prior day Estrada had told Berno that he was there merely because of his inquisitiveness about the Union but that he was stronger against the Union than for it [R. T. 1164, lines 4-10].

Estrada, himself, testified that he told Berno the latter part of February or the beginning of March that he didn't think it was necessary to have a Union in Respondent's plant. Estrada also said that around the same time he had a similar conversation with Payton and told him the same thing [R. T. 1381, lines 10-19].

Payton testified that he had a conversation with Estrada at his working place the end of February and

Estrada stated that he was "against the union coming in and that he had either sent a card in or was going to send a card in" but was doing it solely for the purpose of getting information to find out what was going on. He also complained to Payton about the pressure being put upon him to send in a card. Payton related this conversation that very afternoon to Howland [R. T. 1675, line 7, to R. T. 1676, line 11].

Berno testified that following the meeting of March 14, he spoke to Estrada who told him that he really didn't care about the Union but wanted to find out what was going on [R. T. 1724, line 12-20]. On the morning of March 15, Berno told Howland about his conversation with Estrada [R. T. 1236, lines 17-19; R. T. 1728, lines 15-17; R. T. 1746, lines 18-19; R. T. 1570 lines 7-8].

31. *Fehland:*

Fehland was listed on Respondent's Exhibit #7 as being against the Union. Howland told Fink at their meeting on March 15 that Fehland had expressed he was against the Union and did not want the Union in the plant [R. T. 1164, lines 13-15].

Fehland, himself, testified that in February and March he had talked with Woods, his supervisor, and had told Woods he was opposed to the Union coming into the Company [R. T. 1395; R. T. 1399].

Woods testified that his conversations with Fehland were in the latter part of February or the beginning of March and that he had related these to Howland a day or two afterwards [R. T. 1529, line 10, to R. T. 1530, line 20; R. T. 1541, line 9, to R. T. 1542, line 10].

Isak also said that his conversations were in the latter part of February, or early part of March, and that he had related these to Howland around that time [R. T. 1568, line 15, to R. T. 1569, line 14].

32. *Freeze:*

Howland, on Respondent's Exhibit #7, put Freeze down as being against the Union. Howland testified that Payton had told him Freeze was against the Union [R. T. 1334, line 21]. Payton testified that the latter part of February, Freeze called him over to his working area and told him he was behind the company and against the Union. Some time between March 10 and March 12, Freeze again spoke to Payton and told Payton that Cantrell had threatened to sign an authorization card for Freeze. Both of these conversations were related to Howland [R. T. 1676, line 12, to R. T. 1678, line 1].

33. *Ganske:*

This employee was not listed on Respondent's Exhibit #7, undoubtedly because he was listed among indirect personnel. He was, however, discussed at the meeting between Fink and Howland on March 15 [R. T. 1170, line 22]. What, exactly, was said is not known; it is not on the record. Ganske did not sign a card.

34. *Gardner:*

Gardner was listed on Respondent's Exhibit #7 as being against the Union. Howland told Fink at their meeting that Negrete had told Howland that Gardner was against the Union [R. T. 1168, line 22]. Negrete testified that the first part of March he had a conversation with Gardner at his machine; Gardner had

asked him about the Union and Negrete said he didn't know anything about it. Gardner then said, "If it gets in, I'll quit." Negrete related this conversation to Howland around that time [R. T. 1598, line 8, to R. T. 1599, line 8].

35. *Garger:*

Howland listed Garger on Respondent's Exhibit #7 as being undecided. Garger testified that he normally has conversations with Howland every day and that it was quite possible that the Union question was raised at some of these discussions [R. T. 1519, lines 7-14]. Howland testified that he himself did not have sufficient knowledge from his conversations with Garger to understand Garger's Union position [R. T. 1167, lines 6-8].

36. *Garrett:*

Respondent's Exhibit #7 lists Garrett as being against the Union. Howland testified that Garrett had spoken to him at his bench about the Union and based upon what Garrett said it appeared to Howland that he was not for the Union. Zeman subsequently told Howland that Garrett had said he was against the Union [R. T. 1333, lines 5-11].

37. *Gedminas:*

At the meeting of March 15, Howland told Fink that Gedminas was an individual who had difficulty in making up his mind and it would be hard to determine how he would vote and, therefore, he put him down as being for the Union on Respondent's Exhibit #7 [R. T. 862, lines 11-16].

Lawler supported this conclusion by relating that Gedminas would be for the Union one day and against the Union another day in conversations he had with him, and Lawler so advised Howland [R. T. 1549, line 14, to R. T. 1550, line 3].

38. *Gowan:*

This employee was another one of the indirect personnel who was not listed on Respondent's Exhibit #7 but was discussed at the meeting between Fink and Howland on March 15 [R. T. 1170, line 24, to R. T. 1171, line 9]. Howland testified that Gowan told him and Berno that he was not for the Union because the Union would hinder him in his work. Gowan said he had told the same thing to Berno who told it to both Fink and Howland [R. T. 786, lines 16-20; R. T. 1170, line 24, to R. T. 1171, line 9; R. T. 1337, lines 6-12].

Berno testified that in the early part of March Gowan told him that he didn't want to have anything to do with the Union and was afraid the Union would interfere with scheduling production and hinder him in his job. He did not want to attend the Union meeting. Berno testified he told this to Howland [R. T. 1736, line 15, to R. T. 1737, line 16; R. T. 1776, lines 6-21].

39. *Grice:*

Respondent's Exhibit #7 lists Grice as being against the Union. Fink testified that he had discussions with Grice wherein Grice had told him that a friend of Grice's was injured in a strike and he was against the Union [R. T. 778, lines 6-13]. Grice had made the same statements prior to March 15 to Howland

[R. T. 862, line 23, to R. T. 865, line 8; R. T. 1319, lines 7-19]. Zeman testified in late February Grice told him on numerous occasions he was positively against the Union and around that time Zeman related this information to Howland [R. T. 1621, line 19, to R. T. 1622, line 20].

40. *Gumm:*

Howland listed Gumm on Respondent's Exhibit #7 as being undecided. Fink testified that at the meeting on March 15 Howland had said that Gumm was always on the fence and felt he was undecided [R. T. 865, line 24, to R. T. 866, line 5]. Howland testified that in conversations he had with Gumm as well as conversations that Negrete had which he related to Howland, Gumm appeared undecided [R. T. 1330, lines 20-40]. Negrete supported this testimony by stating that he had conversations with Gumm in which he took differing positions for and against the Union. In March, Negrete told Howland he did not know which way Gumm would go, that he thought Gumm was against the Union but wasn't sure [R. T. 1599, line 9, to R. T. 1600, line 12].

41. *Haeler:*

Respondent's Exhibit #7 lists Haeler as being for the Union. Howland, himself, testified that Haeler had told him at his work bench he was against the Union; Lawler at a later date told Howland that Haeler had said he would not like to see a union at the plant, that the union would bring about a mess, but that subsequently Lawler told Howland that Voegeli had stated that Haeler had signed an authorization card [R. T. 1550, line 4, to R. T. 1551, line 1].

42. *Harrison:*

Howland listed Harrison on Respondent's Exhibit #7 as being for the Union. Howland testified that though he had a number of "kidding" conversations with Harrison, since he did not have any information to feel that he was against the Union, he therefore listed him as being for the Union [R. T. 1167, lines 14-18].

43. *Hibbard:*

Because he was in the indirect personnel group, Hibbard was not listed on Respondent's Exhibit #7. However, prior to the meeting of March 15, Hibbard told both Fink and Howland, separately, that he would not pay dues to anyone and that he would rather quit than work in a union shop. He was quite outspoken against the Union [R. T. 787, lines 15-16; R. T. 1172; lines 1-8].

Berno testified that Hibbard, a draftsman in Engineering, came to him in March and told him there were Union activities going on in the plant and wanted to inow whether Berno and he were included. Berno answered that as far as he knew, all the people who punched the clock were included. Hibbard said, "I'm not paying any damned dues to anybody. I don't pay for a job." [R. T. 1735, line 17, to R. T. 1736, line 1]. The same day, Howland met Berno in the plant and Berno told him what Hibbard had said [R. T. 1774, lines 10-18].

44. *Hinsch:*

Hinsch was listed undecided on Respondent's Exhibit #7 and there is no specific evidence as to why he was so listed.

45. *Hirschmann:*

Hirschmann was listed as being undecided on Respondent's Exhibit #7. Hirschmann was Bruno Zadnik's brother-in-law. Howland, at the meeting of March 15, told Fink that Zadnik had stated that Hirschmann was against the Union. Payton, however, had told Howland that he was unsure about Hirschmann. Howland, therefore, put Hirschmann down as being undecided [R. T. 1166, line 23, to R. T. 1167, line 3]. Moreover, Isak testified he had a conversation in German with Hirschmann at his lathe and that Hirschmann said he did not think the Union could do him any good; Isak said he related this conversation to Howland a few days later [R. T. 1569, line 18, to R. T. 1570, line 11].

46. *Hoef:*

Hoef, who was an apprentice, was also listed as undecided on Respondent's Exhibit #7. Howland testified that he had a conversation with Hoef concerning the Union and that based upon what Hoef said, he thought Hoef was undecided. Howland further testified that Isak had said he had a conversation with Hoef wherein Hoef indicated to Isak he was against the Union. Nonetheless, Howland put him down as being undecided [R. T. 1334, lines 9-15].

Isak testified that in early March he had a conversation with Hoef at his bench and Hoef told him that he, Hoef, did not care for the Union and did not think it could do him any good. Isak stated he related this conversation to Howland the same day [R. T. 1570, line 12, to R. T. 1571, line 3].

47. *Homnan:*

Homnan also was not on Respondent's Exhibit #7, as he was in the indirect category. Fink and Howland did discuss him on March 15, however, and they concluded that because they thought he could not read or write, there was no way of telling whether he would be for the Union, except that Fink was aware, based upon his discussions with people in the plant, that during this time the Union adherents were still working on Homnan to urge him to sign an authorization card [R. T. 785, lines 21-23].

48. *Howard:*

Howard, who was also indirect, was not on Respondent's Exhibit #7, and there is no evidence regarding his position by either Howland or Fink [R. T. 1167, line 5].

49. *Hughes:*

Hughes was listed as being for the Union on Respondent's Exhibit #7, and Fink could not recall a discussion regarding Hughes on March 15 [R. T. 878, lines 23-24].

50. *Hunt:*

Howland, on Respondent's Exhibit #7, marked Hunt down as being against the Union. Howland stated that Hunt told him by the jig bore that he, Hunt, was against the Union for a company of this size. Howland also stated that Payton told him that Hunt made the same statements to Payton [R. T. 1334, line 23, to R. T. 1335, line 2].

Hunt testified that at the end of February or the beginning of March, he had a conversation with Pay-

ton in the production area and told Payton that in his opinion he felt that the Respondent's shop did not need a Union [R. T. 1477, lines 13-16].

Payton corroborated both Hunt's and Howland's testimony, adding that Hunt had told him the first part of March that he was against the Union; that he, Hunt, had had experience with the Teamsters, and that Payton, in turn, related this conversation to Howland [R. T. 1678, line 2, to R. T. 1679, line 15; R. T. 1707, line 1, to R. T. 1708, line 4].

51. *Johnson:*

Howland listed Johnson as being for the Union on Respondent's Exhibit #7. Howland testified that he had no conversations with Johnson of a serious nature, but because Johnson associated with those who were for the Union, he figured he was also for the Union himself [R. T. 1323, lines 19-24]. Negrete testified that Johnson told him he was for the Union [R. T. 1608, line 18].

52. *Kastendick:*

Respondent's Exhibit #7 lists Kastendick as being for the Union. Fink testified that Howland told him on March 15 that either he or Lawler had spoken to Kastendick and Kastendick had said he was for the Union because it would better his trade. Howland testified that he told Fink what Kastendick had told him and said he was for the Union to better his trade [R. T. 1238, lines 19-20].

Lawler testified that Kastendick had made the same statements to him [R. T. 1551, lines 2-23].

Isak testified that in early March, Kastendick made similar statements to him [R. T. 1571, lines 4-24].

Negrete testified that Kastendick told him he was for the Union [R. T. 1608, line 16].

Berno testified that Kastendick had a conversation with him in which Kastendick advised Berno to learn German [R. T. 1781].

Kastendick denied talking to Isak, Lawler and Negrete. He did not deny talking to Howland. In light of the fact that Lawler, Isak and Negrete each testified creditably and clearly, the evidence would indicate that they did, as they testified, have such conversations.

53. *Kevelighan:*

Respondent's Exhibit #7 lists Kevelighan as being against the Union. Fink testified that on March 15, Howland stated he had told him he had had a conversation with Kevelighan in which Kevelighan had stated he had worked in other plants where there was a union and he, Kevelighan, didn't feel it would do Mechanical Specialties any good and, therefore, was against the Union [R. T. 856 to R. T. 857].

Howland testified on redirect examination that he had had such a conversation with Kevelighan, and Howland further stated that Payton, who knew Kevelighan well, told Howland that Kevelighan had made the same statements to him [R. T. 1320, line 11, to R. T. 1321, line 1].

Payton testified that Kevelighan told him he had belonged to a union in Detroit and had been in a strike and had lost more money than he had gotten, and didn't want a union [R. T. 1705, lines 7-10].

54. *Kimura:*

Kimura, a welder, was listed on Respondent's Exhibit #7 as being against the Union. Kimura, him-

self, testified that at the time authorization cards were being distributed, in the early part of March, he had a talk with Howland and he voluntarily told Howland he didn't want anything to do with the Union [R. T. 1439, line 14, to R. T. 1440, line 18].

Kimura also testified that he had a discussion with Isak during the same time and told Isak he wanted no part of the Union [R. T. 1440, line 10, to R. T. 1440, line 18].

Isak testified the latter part of February or early part of March that he had a discussion with Kimura in the welding area and Kimura told him that he, Kimura, did not need a union, or anyone to bargain for him, that he could take care of himself. A few days later, Isak related this conversation to Howland [R. T. 1571, line 25, to R. T. 1572, line 14].

55. *I. Klein:*

This employee was listed as being for the Union on Respondent's Exhibit #7. Howland testified that Klein told him that he was for the Union [R. T. 1169, lines 15-16].

Isak testified that he had a conversation with Klein regarding Klein's losing money on a particular job, and behind in his due dates, and that Isak told him to stick to his job and not to do too much talking, that his job was a losing proposition, and that he, Isak, had seen him doing too much talking. Klein replied something to the effect that when he was working back East he did not have these kinds of problems. This conversation took place in early March [R. T. 1573, line 16, to R. T. 1574, line 12].

56. *T. Klein:*

Howland listed T. Klein on Respondent's Exhibit #7 as being undecided. At their meeting on March 15, Howland and Fink discussed the fact that in the conversations Howland had with Klein and based upon his association with Klein in this plant and in another plant for ten or eleven years, he just couldn't figure out which way Klein was going [R. T. 1165, lines 6-19]. Howland corroborated this testimony [R. T. 1325, lines 9-17].

Isak testified that in the early part of March, he had a couple of conversations with Klein and on one occasion, he said he was for the Union, but the next day he said he was against the Union. Isak told Howland about these conversations and indicated to Howland that Klein was being his usual self. Isak added that he could not ascertain what Klein's position was [R. T. p. 1572, line 15, to R. T. 1573, line 11].

57. *Knoles:*

Howland listed Knoles as being undecided on Respondent's Exhibit #7, but Fink added a "no" notation beside Knoles' name. Knoles testified that at the time the anti-union petition was being circulated, he had a talk with Fink. [R. T. 411, line 22, to R. T. 414, line 4]. Fink testified that the reason he put the "no" beside Knoles' name was that he had a conversation with him prior to March 15 when Knoles was in his office replacing a lamp. Knoles told him he was not for the Union, stating that he had once worked for a trucking line and was in the Union, but felt that because of his age, the Union could do him no good [R. T. 778, lines 15-25; R. T. 867, line 6, to R. T. 868, line 4]. Howland testified that Knoles told him that because of

Knoles' age, he felt the Union couldn't do him any good, but because Knoles also said he had belonged to a Union before, Howland, exercising caution, put him down as undecided [R. T. 1331, lines 1-6].

58. *Kocsis:*

Respondent's Exhibit #7 lists Kocsis as being against the Union. At their meeting of March 15, Howland told Fink that on various occasions, Kocsis had told Howland he was against the Union and that Payton had also told Howland that Kocsis had told him that he was against the Union [R. T. 1163, lines 3-7].

Isak testified that he had conversations in March with Kocsis at his machine, wherein Kocsis had told him he did not care for or want the Union. Isak related these conversations to Howland [R. T. 1574, line 15, to R. T. 1575, line 10].

Payton testified that Kocsis had a conversation with him around the first of March at the boring mill and that Kocsis told Payton that he had belonged to unions in the East but preferred not to belong to them again, and would vote against the Union. Payton related this conversation to Howland [R. T. 1680, line 15, to R. T. 1681, line 18; R. T. 1708, lines 5-11].

59. *Kofink:*

Howland listed Kofink as being undecided on Respondent's Exhibit #7, but Fink added a "no" notation beside Kofink's name.

Kofink testified that he attended the Union meeting on February 28, and that some time following the meeting he had a talk with Fink and indicated to Fink he was not for the Union [R. T. 506; R. T. 511].

The reason Fink put a "no" beside Kofink's name was that Kofink had told him that he had had experiences with unions in Germany and that was the reason he left the country [R. T. 780, line 2-8].

Isak testified that he had conversations with Kofink in German around the middle of March and that Kofink told him he was fed up with the Union and did not like what the Union was doing in the plant. Isak repeated this conversation to Howland [R. T. 1575, line 11, to R. T. 1576, line 4].

60. *Kojaku:*

Kojaku was not listed on Respondent's Exhibit #7 as he is in the indirect personnel group. He was, however, discussed along with other indirect personnel by Howland and Fink at their meeting of March 15 [R. T. 1170 to R. T. 1171]. Fink recalled Howland stating that Kojaku was very quiet and never said much one way or the other and felt he was undecided [R. T. 924, lines 19-21].

61. *Kruse:*

Kruse was not listed on Respondent's Exhibit #7 as he was indirect personnel. At the meeting between Fink and Howland on March 15, however, he was discussed [R. T. 1170 to R. T. 1171]. Howland told Fink that he was not for the Union because in his position it would not do him any good but would hurt him. Howland also mentioned, according to Fink's testimony, that Berno stated the same thing to Howland regarding Kruse [R. T. 786, line 21, to R. T. 787, line 12; R. T. 886, lines 1-15].

Howland testified that Kruse told him that the Union couldn't do him any good and that he was against it [R. T. 1171].

Berno stated that he had had a conversation around the first of March, and that Kruse had told Berno that Amthor had said to Kruse that the Union organizers had been bugging him (Amthor) to sign a card, and that he, Kruse, told Amthor not to pay any attention to that. Kruse said that he did not want the Union to come into the shop, that it wouldn't do him any good. Later that day, Berno told Howland of this conversation [R. T. 1737, line 18, to R. T. 1738, line 2].

62. *Kuhmann:*

Kuhmann, probably inadvertently, was not listed on Respondent's Exhibit #7. He testified that, a few days after he signed his authorization card, he had had a talk with Payton, and told Payton that he was against the Union because of the seniority provisions that the Union would probably want. Kuhmann said he had heard about the seniority matter from someone outside of the plant [R. T. 564, line 1, to R. T. 565, line 6; R. T. 566, line 16, to R. T. 568, line 9].

At their meeting on March 15, Howland stated that Payton had said that Kuhmann told him that he would quit his job if the Union came in [R. T. 786, lines 7-13]. Payton testified that he had a conversation with Kuhmann around the first of March, and that Kuhmann had called him over to his lathe. Payton testified that Kuhmann did not speak very good English but told Payton he did not want the Union to come in, adding that as a foreigner, "There are many foreign people for the Union, and if they know you don't send a card in they put pressure on you." Payton said that they couldn't put pressure on him, and Kuhmann said that at any rate, he was against the Union because of the seniority provisions.

Payton told Howland of this conversation and of Kuhmann's statement that pressure was being applied him that same day [R. T. 1682, line 21, to R. T. 1683, line 5].

63. *Harold A. Lamb:*

Respondent's Exhibit #7 lists Harold A. Lamb, a tool maker, as being against the Union. While there is some confusion in the testimony about this employee and another employee named Herbert F. Lamb, the testimony indicates that at the meeting of March 15, Howland told Fink that Zeman had told Howland that Lamb was against the Union [R. T. 1168, lines 24-25]. Zeman, himself, testified that he had a conversation with this employee in early March during a coffee break at his bench. Another employee, Pashone, was present. Both Pashone and Lamb said there was a lot of union signing up going on and each of them said that they were against the Union. Though Zeman did not say anything to them, he related what he had heard to Howland in early March [R. T. 1622, line 21, to R. T. 1623, line 23].

64. *Herbert F. Lamb:*

Respondent's Exhibit #7 lists Herbert F. Lamb as being undecided. Fink testified that at the meeting of March 15, both he and Howland discussed Lamb whom they had known for many years. They believed and stated that Herbert F. Lamb was the type of individual who one could never be certain about [R. T. 868, lines 5-14]. Howland testified that he had a conversation with Lamb wherein Lamb stated he was against unions but that the Union was putting pressure on him to

join up. Since Howland knew that Lamb was associating with employees who were sympathetic with the Union, he decided to put H. F. Lamb down as undecided as he would tell Howland one thing but his actions would reflect another [R. T. 1331, lines 7-13]. This employee also told Negrete that he was for the Union [R. T. 1608, lines 10-18].

Lamb, called on rebuttal by the General Counsel, testified that he did not have any talk with Zeman. However, Zeman's talk was with Harold Lamb. He agreed he had a talk with Howland but could not recall telling Howland that the Union was putting pressure on him [R. T. 1793].

65. *Lary:*

Lary, as an "indirect" employee, was not listed on Respondent's Exhibit #7 but was discussed between Fink and Howland. Fink testified that Lary told him that he had been a carpenter in the motion picture industry, that he made good money when he was working, but he wasn't working very often. Therefore, he did not want to belong to a union [R. T. 788, lines 10-16]. Howland testified that Fink told him about his conversation with Lary on March 15 [R. T. 1171, lines 18-25]. Berno also testified that Lary made the same statements to him and that soon thereafter, Berno related this conversation with Lary to Howland [R. T. 1738, line 13, to R. T. 1739, line 4].

66. *Lawrence:*

Howland listed Lawrence on Respondent's Exhibit #7 as being against the Union. Howland told Fink on March 15 that Lawrence had told him that, he,

Lawrence, had been in unions before but that in a company the size of Respondent's, he did not see any need for the Union but that if the Union got in, he would join because he had to work with the rest of the employees. Howland also said that Negrete had a similar conversation with Lawrence which he related to Howland [R. T. 1163, line 21, to R. T. 1164, line 3; R. T. 1324, line 22, to R. T. 1325, line 8].

Lawrence, himself, testified that during the period that authorization cards were being distributed, he had a talk with Negrete in which he told Negrete that he was going to vote against the Union although if the Union did get in, he would join [R. T. 1482, lines 6-17]. Negrete testified that he had a conversation with Lawrence at the latter's bench the first part of March. Lawrence had called him over and told him that the Union activity was going around but Lawrence did not think the Union was good for job shops, that if it got in he would join; he would not fight it. Negrete related this conversation to Howland [R. T. 1600, line 13, to R. T. 1601, line 7; R. T. 1612, line 14, to R. T. 1613, line 1].

67. *Letts:*

Respondent's Exhibit #7 lists Letts as being against the Union. Howland, himself, was uncertain where he obtained his information but believed it came from Woods [R. T. 1169, lines 1-4]. Woods testified that in the latter part of February or beginning of March, he had a conversation with Letts wherein in the course of it, Letts advised him that there was a lot of Union activity going on. Letts stated that he hoped the Union would not get into Mechanical Specialties, that he had

had experience with unions before and mentioned Alba Engineering. Woods related this conversation to Howland on the same day [R. T. 1530, line 21, to R. T. 1531, line 22]. Woods also testified that he had other conversations during this period of time with Letts and that Letts had blamed the downfall of Alba Engineering on the Union [R. T. 1542, lines 11-23].

68. *Mancini:*

Mancini was listed as being against the Union on Respondent's Exhibit #7. Mancini, himself, testified that in the latter part of February or beginning of March, he had a talk with Payton in the inspection room and he told Payton that he was against the Union [R. T. 1486, line 7, to R. T. 1487, line 2; R. T. 1488, lines 2-17]. Payton testified to this conversation with Mancini, confirming the fact that it was in the first part of March and confirming the fact that Mancini clearly stated he was against the Union. That same evening, Payton related his conversation with Mancini to Howland [R. T. 1683, line 6, to R. T. 1684, line 25].

69. *Mansfield:*

Howland listed Mansfield as being against the Union on Respondent's Exhibit #7. Mansfield, himself, testified that in early March, after the time he signed his card but long before he sent it in, he had a conversation with Payton, his supervisor, in which he told Payton he was against the Union [R. T. 628, lines 11-17]. Howland testified that Payton related this conversation to him and that he, in turn, mentioned it at the meeting of March 15 [R. T. 1239, lines 14-16].

Payton testified to his conversation with Mansfield which he recalled as being approximately in the last part of February. He stated that Mansfield told him he was against the Union, that he had been a member of a union in San Diego but could see no reason for a union at Mechanical Specialties. The following evening, Payton related this conversation to Howland [R. Tr. 1684, line 26, to R. T. 1685, line 24].

70. *Mellone:*

Respondent's Exhibit #7 lists Mellone as being undecided. This employee was discussed between Fink and Howland on the evening of March 15 and it was pointed out between them that Mellone was an articulate type person and a person that would go into detail in anything he would do. Based upon that understanding of Mellone, he was felt to be undecided [R. T. 869, lines 7-12]. Isak, Mellone's supervisor, may have passed the same information along to Howland [R. T. 1331, lines 15-21].

71. *Meier:*

This employee was marked as being for the Union on Respondent's Exhibit #7. Howland could not recall anything that was said about him on the evening of March 15 [R. T. 1167]. At the time of the hearing, he was in Oregon [R. T. 1739 to R. T. 1740].

71. *Moran:*

Respondent's Exhibit #7 lists Moran as being against the Union. Howland testified that he told Fink on the evening of March 15 that Moran had told Howland in the welding booth that he did not want anything to do with the Union based upon his experi-

ences with unions in Scotland. Howland further testified that Isak, Moran's supervisor, had a similar conversation with him [R. T. 1167, lines 19-22; R. T. 1325, line 20, to R. T. 1326, line 9].

Isak testified that he had a conversation in the welding area in the latter part of February with Moran [incorrectly transcribed at times as Morrow], who told him that he had worked for unions in England and Scotland and that he did not care for unions. Isak related this conversation to Howland the same day [R. T. 1576, lines 5-23].

73. *Morris:*

Morris was listed on Respondent's Exhibit #7 as being against the Union. Fink testified that on the evening of March 15, Howland told him that Morris was a strong conservative and that Morris had stated he was against the Union [R. T. 879, lines 18-25]. Isak stated that he had conversations concerning the Union in the early part of March with Morris and that during these conversations, Morris had stated that he did not care for the Union and that, "As a young American I don't believe in that stuff." Morris told Isak that he was against the Union and on the same day or within a few days, Isak related this conversation to Howland [R. T. 1576, line 24 to R. T. 1578, line 13]. Morris confirmed the fact that at the beginning of the campaign, he had a conversation with Isak in which he told Isak he was against the Union, that he thought it was a big farce. He also stated that he had conversations with Howland in which he told Howland he was definitely against the Union [R. T. 1405, line 18, to R. T. 1408, line 19].

74. *Morrow:*

This employee was listed as being for the Union on Respondent's Exhibit #7. Howland testified that Zadnik had told him that Morrow was for the Union and Howland, himself, had seen him in close company with openly avowed Union adherents [R. T. 1335, lines 12-15].

75. *Myer [Meyer]:*

Howland listed Meyer as being against the Union. He told Fink on the evening of March 15 that Payton had told him that Meyer had stated he was against the Union [R. T. 1166, lines 2-3].

Payton testified that he had conversations with Meyer at the beginning of Union activity and that Meyer had told him that he hoped the Union did not get in, that he was against the Union. He further told Payton that if the Union got in, he would quit. The following day, Payton related this conversation to Howland [R. T. 1686, line 12, to R. T. 1687, line 5].

76. *G. Neumann:*

This employee was listed as being for the Union on Respondent's Exhibit #7. Howland testified that though he did not have any particular discussions with him regarding the Union but because he was Karl Neumann's brother and Karl Neumann was openly for the Union, he thought Gunther would be too [R. T. 1167, line 23, to R. T. 1168, line 1].

77. *Karl Neumann:*

Karl Neumann was listed as being for the Union on Respondent's Exhibit #7 and Howland testified that he

openly made known his pro-union activity [R. T. 1167 to R. T. 1168].

78. *Nowak:*

Respondent's Exhibit #7 lists this employee as being against the Union. On March 15, Howland told Fink that Isak, Nowak's foreman, said that Nowak was against the Union [R. T. 1166, lines 8-10]. Isak testifide that Nowak told him in early March that based upon his experiences in Germany, he, Nowak, did not believe in the Union, was against it, and that he did not sign a card. Nowak further told Isak that Booze, [Kirk] Riegler, Kofink and Voegeli were against the Union and that Ahlstrom and Klein were very strong and for the Union. Isak related this conversation in the early part of March to Howland [R. T. 1565, line 18, to R. T. 1567, line 19].

79. *Christopher Odell [Odell Christopher]:*

This employee was not listed on Respondent's Exhibit #7 as he was the sweeper in the front office. Testimony indicates that in the beginning of March, Payton had a discussion with him wherein Odell [O'Dale] indicated that he was thinking of voting for the Union. Payton related this to Howland [R. T. 1689, line 6, to R. T. 1690, line 4].

80. *O'Kane:*

O'Kane is not listed on Respondent's Exhibit #7 as he, a truck driver, was not considered a "direct" employee. Neither Fink nor Howland knew much about this individual and could not determine his position for poll purposes. [R. T. 786, lines 4-6].

81. *Osdale:*

Respondent's Exhibit #7 lists Osdale as being undecided. Zeman testified that he told Howland that in the discussions he had with Osdale, Osdale indicated to him that he was undecided [R. T. 1624, lines 2-8].

82. *Pashone:*

Respondent's Exhibit #7 lists Pashone as against the Union. On March 15, Howland told Fink that Zeman, Pashone's leadman, had told Howland that Pashone stated he was against the Union [R. T. 1165, lines 20-22]. Pashone, himself, testified that at the time cards were being distributed, none was given to him because it was well known he was against the Union [R. T. 1508, line 22, to R. T. 1509, line 3]. During the same period of time, he had a discussion with other employees concerning the Union and during this discussion, Zeman was present. Pashone testified that at that time he stated he was against the Union as did some other employees, including Grice and Whiteman [R. T. 1509, line 5, to R. T. 1510, line 5].

Zeman testified to being present during a conversation wherein both Pashone and Harold Lamb told him that they were against the Union. This was in early March and Zeman related this conversation to Howland [R. T. 1622, line 21, to R. T. 1623, line 23]. Zeman further testified that in addition to that conversation, there was another conversation in early March, had during a coffee break, where Pashone and Grice stated they were against the Union, that they did not want to see a Union in the shop. Zeman also related this conversation to Howland [R. T. 1624, line 17, to R. T. 1626. line 4].

83. *Patterson:*

Respondent's Exhibit #7 lists Patterson as being for the Union. Howland testified that he was a fairly new man but because he was in the classified department and most of the people in the classified department appeared to be for the Union, he figured Patterson was as well [R. T. 1169, lines 10-15].

Lawler, though he had no conversations with Patterson, concluded that Patterson was for the Union for the same reason that Howland formed the same opinion and so told Howland [R. T. 1551, line 24, to R. T. 1552, line 22].

84. *Poirier:*

Howland listed Poirier on Respondent's Exhibit #7 as being against the Union. Howland testified that Woods had told Howland that Poirier was a staunch conservative and was against the Union because of his political beliefs [R. T. 1324, lines 14-21].

Woods testified that he had a number of conversations with Poirier concerning the Union, some of which were prior to any Union activity, that Poirier was a member of the John Birch Society and that he had told Woods of his sad experiences with the union at North American Aviation. When union activities began, Poirier repeated his experience at North American to Woods and told Woods he was "violently opposed" to the Union at Respondent's plant. Woods related this conversation to Howland the same day [R. T. 1531, line 23, to R. T. 1534, line 2]. At the time of the hearing, Poirier was in Texas [R. T. 1739, to R. T. 1740].

85. *Polony:*

Howland listed Polony as being undecided on Respondent's Exhibit #7 but Fink had a "no" notation beside Polony's name. Fink testified that he had had a conversation with Polony wherein Polony told him that he had worked in Chicago and at North American where they were unionized and he felt that a shop of Respondent's size did not need a union [R. T. 779, lines 20-25].

Howland testified that he had several discussions with Polony by his machine and that Polony indicated he was undecided. Negrete, however, a couple of days later, according to Howland, informed Howland that Polony was against the Union because of prior associations with them. Being extremely cautious, Howland put Polony down as being undecided [R. T. 1333, line 24, to R. T. 1334, line 7]. Negrete testified to his conversations with Polony around the first of March. On one occasion, Polony called him over and told him that he had been to a meeting but that he was not for the Union because the Union had nothing to offer him and that the Company had been good to him. Approximately a week later, Negrete told Howland about his conversations with Polony as well as other employees under his supervision [R. T. 1601, line 8, to R. T. 1602, line 11].

Polony, himself, testified that during the same period of time, the end of February or beginning of March, he had a discussion with Negrete and told Negrete he was not in favor of the Union; that he was waiting to see what they had to offer; that he had been a member before and that he had no particular reason to campaign for them. He further testified that around this time

he had a talk with Howland and he told Howland he was confused about the Union and indicated he was undecided. During the same period of time, he had a talk with Fink and he told Fink the Union did not have anything to offer so he was not for the Union [R. T. 1375, line 10, to R. T. 1377, line 6].

86. *Proudfoot:*

This employee was listed as being against the Union on Respondent's Exhibit #7. He, himself, testified that it was "quite possible" that he had a talk with Bert Woods concerning the Union at the beginning of the Union campaign.

Fink testified that on the evening of March 15, Howland told him that Proudfoot and Woods were close friends, each having come from Scotland and that Woods had reported to Howland that Proudfoot was against the Union. Howland, in his testimony, affirmed the fact that Woods had told him that Proudfoot had stated he was against the Union and did not want any part of it [R. T. 876, lines 17-23; R. T. 1332, lines 16-21].

Woods testified that he had long known Proudfoot and had visited him in his home socially and he had discussed the Union with him in the latter part of February or beginning of March. Proudfoot had brought up the subject and had told Woods that he was against the Union in Respondent's plant, mentioning his union background in Scotland at the time. Woods related this conversation to Howland either that evening or the next morning [R. T. 1534, line 3, to R. T. 1535, line 22].

87. *Rawl:*

On Respondent's Exhibit #7, Rawl was listed as "against—weak". Howland told Fink that Payton had

said that Rawl was against the Union but Howland had talked to Rawl and had gotten a different impression and, therefore, added the word "weak" to the opinion that he was against the Union [R. T. 1168, lines 10-14]. Apparently, Howland misinterpreted or was confused as to what Payton had said for Payton testified that shortly before March 14, Rawl had voluntarily stated to Payton that he was for the Union and that Payton had related this conversation to Howland [R. T. 1687, lines 6-21]. Howland's impression from his talks with Rawl apparently was correct.

88. *Rhedin:*

This employee, who was the tool crib man and therefore among the indirect group, was not listed on Respondent's Exhibit #7. It appears that his name was discussed along with other indirect personnel between Fink and Howland [R. T. 1170, lines 12-17].

Rhedin, himself, testified that he had a talk with Lawler around the time he signed the authorization card and that he told Lawler he did not want to have anything to do with the Union. He also had a talk with Berno and told Berno he was against the Union [R. T. 1451, lines 2-23]. Lawler testified that in the latter part of February, Rhedin called him over to the tool crib and told him that he was against the Union, adding that he had worked in a plant where there was a union and that he had lost his job. Later that evening, Lawler related his conversation with Rhedin to Howland [R. T. 1552, line 23, to R. T. 1553, line 17]. Berno also testified that at the end of the Union meeting on March 14, he spoke to Rhedin who came over to him and told him that he was there to find out what was

going on but that he had no use for the Union because he was too old [R. T. 1724, line 23, to R. T. 1725, line 6].

89. *Riegler:*

Respondent's Exhibit #7 lists Riegler as being against the Union. Howland told Fink on March 15 that [Bruno] Zadnik had stated that Riegler had stated that he was against the Union in a shop the size of Respondent's [R. T. 1166, lines 19-22]. Fink added a "no" notation beside Riegler's name based upon his long association with Riegler [R. T. 783, lines 2-14].

Riegler testified that in February and March of 1965, he had discussions with Fink regarding the Union in which he told Fink he did not want a union in Respondent's plant and added that he hoped the Company would prevail against the Union. He also stated that he had told Isak during the same period of time that he was against the Union [R. T. 1389, line 1, to R. T. 1390, line 10; R. T. 1393, line 2, to R. T. 1395, line 4]. Isak testified that Riegler spoke to him at the end of February and in German told him that he was against the Union. Isak is a close personal friend of Riegler's. Isak also testified that Riegler told him he attended a Union meeting some time at the end of February and that he, Riegler, was not impressed by what he had heard. Isak related this conversation to Howland [R. T. 1562, line 3, to R. T. 1563, line 25; R. T. 1579, lines 4-17].

90. *Schlapp:*

Respondent's Exhibit #7 lists Schlapp as undecided; however, the record shows that Isak testified that in early March he had a conversation with Schlapp in

German wherein they talked about the job and other things and the Union was raised and Schlapp said he didn't like the unions in Germany and didn't want to see a union at Mechanical Specialties. Within a few minutes thereafter, Isak related this conversation to Howland [R. T. 1579, line 18, to R. T. 1580, line 14].

91. *Scoggins:*

This employee, a janitor, was listed on Respondent's Exhibit #7 as being for the Union. Zeman, however, testified that in the latter part of February, Bradley told Zeman that he was against the Union and that another employee, Scoggins, was also against the Union. At the end of February, Zeman related his conversation with Bradley concerning Scoggins to Howland [R. T. 1620, line 16, to R. T. 1621, line 18]. Bardley, himself testified that he did, indeed, tell Zeman in the latter part of February that Scoggins was against the Union and he told this to Zeman after talking to Scoggins [R. T. 1497, line 3, to R. T. 1498, line 9].

92. *Scovel:*

This employee was the night tool crib man and, therefore, in the "indirect" group and thus not on Respondent's Exhibit #7. However, on the evening of March 15, Howland told Fink that Scovel had said he was against the Union. Scovel testified that around the time he was asked to sign a Union authorization card, he had had a number of conversations with Walter Payton who was a personal friend of his and his supervisor. Scovel testified he told Payton that Respondent's was an exceptionally good company and that the Union would be detrimental to its operations that while he, Scovel, was not against unions as such, he did not think

that one was desirable in Respondent's plant. During the same period of time, Scovel had a conversation with Berno and volunteered to Berno that he was against the Union [R. T. 1493, line 6, to R. T. 1494, line 18].

Payton testified that around the first of March he had a talk with Scovel at the tool crib. Scovel had called him over and told him that he, Scovel, had belonged to a union at Aerojet; that he did not think Respondent needed a union and that Respondent had done a lot for him. Payton related his conversation with Scovel to Howland the following evening [R. T. 1688, line 2, to R. T. 1689, line 6]. Berno stated that he had frequent conversations with Scovel around this period of time and that Scovel had said that he was against the Union; Berno did not recall whether he told Howland about these conversations [R. T. 1773, lines 6-18].

93. *Senyk:*

Respondent's Exhibit #7 lists Senyk as being against the Union, his name having been added to the bottom of the list during the meeting of March 15 [R. T. 784, lines 3-7]. At that meeting, Howland told Fink what Isak had told him that Senyk had said he was against the Union [R. T. 1169, lines 22-23]. Senyk, himself, testified that on or about March 11, 1965 (when he returned to work from a long absence), he had a talk with Isak whom he had known for a number of years and that he, Senyk, told Isak he was against the Union [R. T. 1402, line 15, to R. T. 1403, line 17]. Isak testified that he had a conversation with Senyk around the middle of March and Senyk had said that at the last place he worked there was a Union that he did not care for it and that he was against the Union in this plant.

Isak related this conversation to Howland [R. T. 1580, line 15, to R. T. 1581, line 6].

94. *Seymour:*

Seymour was an indirect employee and, therefore, not listed on Respondent's Exhibit #7. He was, however, discussed between Fink and Howland at the meeting of March 15 where it was stated that Seymour had said that he was an older man and did not see what good the Union could do him [R. T. 785, lines 8-13]. Seymour, himself, testified that at the time he signed his card, in order to be on a friendly basis with his fellow employees, he told Berno that he was not in favor of the Union. Berno confirmed the fact that just prior to attending the meeting of March 14, Seymour told him that he was against the Union [R. T. 1443, lines 7-16; R. T. 1772, lines 2-25].

95. *Smith:*

Howland listed Smith, an apprentice, as against the Union on Respondent's Exhibit #7. Howland testified that he talked to Smith in the main plant area and that Smith expressed the fact that he didn't think the Union could do him any good because he was an apprentice. Howland also testified that Isak told him that Smith had told Isak that he was against the Union [R. T. 1324, lines 1-13]. Negrete testified that he had a talk with Smith at Negrete's bench in March and that after discussing the apprenticeship program in general, Smith wanted to know what the Union had to offer in regard to an apprenticeship program. Negrete said he did not know and Smith said, "I don't think the Union could do me anything good." [R. T. 1602, line 12, to R. T. 1603, line 6].

96. *Stow:*

This employee was in the indirect group and not on Respondent's Exhibit #7. On the evening of March 15, Stow was discussed. Both Fink and Howland considered him to be against the Union. Fink recalled Stow stating that he, Stow, was very happy with his job and didn't see how the Union could help him in any way [R. T. 925, lines 1-5].

97. *Teiman:*

Respondent's Exhibit #7 lists Teiman as being for the Union. Howland told Fink on March 15 that he felt Teiman to be for the Union because he had stated that the Union would be good for his trade [R. T. 878, lines 15-22; R. T. 1333, lines 13-17].

98. *Thiekotter:*

Respondent's Exhibit #7 lists Thiekotter as being undecided. Isak testified that he had a conversation with Thiekotter in the early part of March in German and that Thiekotter stated that maybe he would get more money if the Union came in but on the other hand, he stated he did not care for the Union. This left Isak with the impression that Thiekotter was undecided and he so told Howland [R. T. 1581, lines 7-25].

99. *Thomas:*

This employee was also in the indirect group and was not included in Respondent's Exhibit #7. Fink told Howland at the meeting of March 15 that Thomas had said he was against the Union. Fink testified that he believed Thomas had spoken to Howland and Berno stating the same thing [R. T. 785, lines 14-17].

Fink recalled Berno telling Fink about his conversation with Thomas but did not recall when [R. T. 884, line 20, to R. T. 885, line 13]. Fink also testified that as late as March 15 the Union was still working on some employees trying to get them to sign authorization cards and that one of these employees was Johnny Thomas who told him about this [R. T. 956, lines 1-13]. Howland testified that Thomas told him at the tool crib that he was against unions for political reasons [R. T. 1337, lines 13-17]. Berno testified that in the latter part of February or beginning of March, Thomas, who had expressed conservative political views on many occasions, told Berno that he was against the Union. At another time, Thomas told Berno that Ahlstrom was badgering him [R. T. 1768, line 11, to R. T. 1770, line 12].

100. *Twardowski:*

Twardowski is listed on Respondent's Exhibit #7 with the notation "unknown". Howland explained that the reason for this was that Twardowski had very recently been employed by Respondent and his feelings were not known [R. T. 1169, lines 19-21].

101. *Virgil:*

Respondent's Exhibit #7 lists Virgil a being undecided. Virgil, himself, testified on cross-examination that some time at the beginning of March he told Howland that he did not know whether he was for or against the Union and that he was undecided [R. T. 381, line 24, to R. T. 382, line 9].

On the evening of March 15, Fink recalls it being mentioned that Virgil was the type of individual that moved from one job to another and it was difficult to

determine whether he was for or against the Union [R. T. 870, lines 9-15].

102. *Voegeli:*

Howland listed Voegeli as being for the Union on Respondent's Exhibit #7. At the meeting of March 15, Howland told Fink that Voegeli had said that the Union would help him in his trade. Howland confirmed Fink's testimony and stated that Lawler had told Howland that Voegeli had made such statements to Lawler [R. T. 870, line 21, to R. T. 872, line 9; R. T. 1321, line 3, to R. T. 1322, line 4].

Lawler testified that Voegeli told him he was in favor of the Union [R. T. 1553, lines 18-25]. Negrete testified that he had a conversation with Voegeli at the end of February where Voegeli urged him to "get on the Union bandwagon" and he told Negrete that the Union was going to "organize all of Southern California." When Negrete joshed with him and indicated that he wasn't particularly interested in the Union, Voegeli said, "We will take care of you, anyway." Negrete described Voegeli as a very good friend [R. T. 1605, line 10, to R. T. 1606, line 1].

103. *Vogl:*

Howland listed this employee on Respondent's Exhibit #7 as being against the Union and Fink added the notation "no", meaning that he, also felt Vogl was against the Union.

Vogl, himself, testified on cross-examination that some time in March or April, he had a conversation with Howland in which he told Howland, "I don't need anything like the Union, I can take care of myself."

[R. T. 557, line 15, to R. T. 558, line 14]. Fink testified that the reason he put the notation "no" after Vogl's name was that prior to that time, he had spoken to Vogl and Vogl had said to him, "I can handle my own battles. I don't need a third party to do any deciding for me." [R. T. 781, lines 19-25]. Howland testified that he had had a conversation with Vogl where Vogl had stated that he did not need anyone else to bargain for him, that he could handle his own problems [R. T. 1335, lines 3-6].

104. *Watts:*

This employee was an indirect employee and, therefore, not listed on Respondent's Exhibit #7. At the meeting of March 15, Watts was discussed and Fink testified that it was mentioned that Bill Leslie, the Company estimator, had told Fink that Watts was certainly against the Union, that Watts had stated that he remembered what had happened at another company, Falco, and that he, Watts, was against the Union [R. T. 787, line 20, to R. T. 788, line 9].

105: *Welch:*

Howland listed Welch as being for the Union on Respondent's Exhibit #7. Howland testified that Welch had said that the Union would better his trade and that Lawler had told Howland that Welch had said the same thing to him [R. T. 1332, lines 3-7].

106. *Robert (Uwe) Weymar:*

Respondent's Exhibit #7 lists U. Waymar (Robert) as being undecided. Weymar, himself, testified that he had a talk with Howland in March where he made statements both for and against the Union and where he

indicated to Howland that he was undecided [R. T. 523, lines 15-21; R. T. 525, line 19, to R. T. 527, line 11].

107. *Rolf Weymar:*

Respondent's Exhibit #7 lists Rolf Weymar as being for the Union with the added comment "weak". Fink testified that at the meeting of March 15, Howland stated that Rolf Weymar was a friend of Karl Neumann and that Neumann was apparently for the Union and Howland felt that Weymar would be as well. Howland testified that he had a conversation with Rolf Weymar and that based upon that conversation, he considered Weymar to be leaning toward the U.A.W. but not strong in his belief [R. T. 877, lines 9-21; R. T. 1332, line 25, to R. T. 1333, line 4].

108. *Whiteman:*

Respondent's Exhibit #7 lists Whiteman as against the Union. Howland testified that Whiteman, at his bench in the production area, prior to March 15, told Howland that he was concerned about the Union coming into the plant and that based upon his past experiences, he did not want the Union. Howland also testified that Zeman had told him that Whiteman told Zeman the same thing [R. T. 1332, line 23, to R. T. 1323, line 15].

Whiteman testified that at the beginning of the Union organization campaign, Voegeli approached him with Union literature which he refused to take. Around the same time, Whiteman told Howland and "anyone else that would listen" that he emphatically rejected the Union [R. T. 1434, lines 12-25]. He also testified that he spoke to Zeman about the Union at the "beginning, during, and all around" the campaign [R. T.

1435, lines 1-7]. Zeman testified that approximately late February he had a conversation with Whiteman at his bench and Whiteman said that he did not sign a card and he was positively against the Union. In late February, Zeman related this conversation to Howland [R. T. 1626, line 5, to R. T. 1627, line 2].

109. *Wiley:*

There is no discussion of this employee in the record. It appears that he was sick during the period in question.

110. *Williams:*

Howland listed Williams as being undecided on Respondent's Exhibit #7. Both Fink and Howland agreed that Williams was the type of person who frequently changes his mind and, accordingly, he was listed as undecided [R. T. 872, line 23, to R. T. 873, line 3]. Lawler, however, testified that he often drove to work with Williams and that around the first of March, while driving to work, Williams told him that while the Union may be good for more money, he, Williams, was against the Union; that he had worked for unions back East and that he would not like to see one in Respondent's plant. Lawler related this information to Howland around the first of March [R. T. 1554, line 3, to R. T. 1555, line 10].

111. *Wilson:*

Respondent's Exhibit #7 lists Wilson as being for the Union. Fink testified that Wilson had indicated to either Howland or Lawler that Wilson had said he was for the Union [R. T. 873, lines 9-12]. Howland testified that Wilson told him he was for the U.A.W. to

improve his trade and Lawler stated that Wilson told him the same thing [R. T. 1322, lines 16-18; R. T. 1555, lines 11-20].

112. *Wright:*

Respondent's Exhibit #7 lists Wright as being for the Union. Howland had indicated that Wright had said he was for the Union because it would improve his trade [R. T. 874, lines 9-13; R. T. 1239, lines 5-10].

113. *Zadnik:*

Respondent's Exhibit #7, which lists Zadnik as a leadman, also indicates that both Howland and Fink considered him to be against the Union. Fink testified that he had known Zadnik for 12 to 15 years and based upon his knowledge of the individual, he felt that Zadnik was against the Union. Howland told Fink that Zadnik had told Howland that he, Zadnik, was against the Union [R. T. 783, lines 2-7; R. T. 1166, lines 16-18]. At the time of the hearing, Zadnik was in Oregon [R. T. 1739, to R. T. 1740].

114. *Zirbel:*

Respondent's Exhibit #7 lists Zirbel as being undecided and Howland, himself, based upon his conversations with Zirbel, was unclear as to Zirbel's position; however, Howland stated that Negrete told him that Zirbel stated he was happy the way things were going in the plant [R. T. 1332, lines 8-15].

Negrete testified that in the latter part of February or beginning of March, he had a number of conversations with Zirbel. Zirbel had asked him a number of questions as to what the Company was going to do regarding the Union and Negrete said he did not know.

Based upon these discussions, Negrete concluded that Zirbel was against the Union and so told Howland, Negrete further based his opinion on knowing Zirbel for a number of years [R. T. 1603, line 10 to R. T. 1604, line 18].

APPENDIX D.

Pertinent Statutory Provisions.

Sec. 8(a): It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least

a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a);

Sec. 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in

the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX E.

(Pursuant to Rule 18(f) of the Rules of Court.)

General Counsel's Exhibits.

No. 1(a)-109(c)	Identified	Received	Rejected 8
1(a)-1(o)	5	5	
1(p)	6	6	
2	34		
3	40	42	
4	42	43	
5	44	44	
6	45	45	
7	46	47	
8	50		722
9	51	818	722*
10	53	53	
11	53		722
12	55		723
13	56		723
14	57	894	723*
15	58	725	
16	58		725
17(a) & (b)	59	725	
18	60		726
19	60	727	
20	62	727	
21	66	728	
22	84	86 728	
23	88		
24	89	729	
25	119	120	
26	113	135	
27	133	135	
28	272	273	

General Counsel's Exhibits.

No. 1(a)-109(c)	Identified	Received	Rejected 8
30	389	390	
31	408	409	
32	410	412	
33	426	427	
34	480	482	
35	623	626	
36	696	697	
37	699	699	
38	704	705	
39	705		
40	193	193	
41	194	194	
42	195	195	
43	196	196	
44	196	196	
45	198	198	
46	199	199	
47	581	581	
48	200	200	
49	201	201	
50	201	201	
51	202	202	
52-1	203	203	
52-2	203	203	
53	204	204	
54	204	204	
55	588	588	
56	205	205	
57	206	206	
58	206	206	
59	207	207	
60	208	208	

General Counsel's Exhibits.

No. 1(a)-109(c)	Identified	Received	Rejected 8
61	209	209	
62	210	210	
63	210	210	
64	211	211	
65	211	211	
66	212	212	
67	217	217	
68-1 & 68-2	571	571	
69	220	220	
70	221	221	
71	222	222	
72	222	222	
73	223	223	
74	224	224	
75	225	225	
76	226	226	
77	227	227	
78	228	228	
79	228	228	
80	229	229	
81	230	230	
82	231	231	
83	234	234	
84	235	235	
85	235	235	
86	236	236	
87	237	237	
88	238	238	
89	238	238	
90	239	239	
91	240	240	
92	240	240	

General Counsel's Exhibits.

No. 1(a)-109(c)	Identified	Received	Rejected 8
93	242	242	
94	242	242	
95	243	243	
96	244	244	
97	245	245	
98	245	245	
99	246	246	
100	272	273	
101	717	720	
102	1186		
103	1200	1200	
104(a)(b)(c)	1253	1258	
105(a)(b)(c)	1258	1287	
106	1286	1286	
107	1286	1287	
108	1288	1290	
109(a)(b)(c)	1289	1290	

*Exhibits No. 9 and 14 were initially rejected by the Trial Examiner, who later reconsidered and then received them.

Employer
Mechanical Specialties

No. 1-23	Identified	Received	Rejected
1	163		171
2(a)(b)(c)	330		
3	403		
4	758	759	
5	760	761	
6	770	771	
7	774	789	
8	830		
9	835	839	
10	846	850	
11	1030	1031	
12	1100	1100	
13	1101	1101	
14	1104	1104	
15(a)	1123	1126	
15(b)	1123	1126	
15(c)	1123	1126	
15(d)	1123	1126	
16		1196	
17	1127	1127	
18	1303	1303	
19(a)(b)(c)	1309	1309	
20(a)(b)(c)	1310	1310	
21	1312	1312	
22(a)(b)(c)	1312	1312	
23	1340		1341

Charging Party

No. 2	Identified	Received	Rejected
1	1347	1354	
2	1803	1804	